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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MARIO M. CUOMO, Governor of the State of New York, and THOMAS A. COUGHLIN III, Commissioner of the New York State Department of Correctional Services,

Petitioners,

vs.

RICHARD J. KOEHLER, Commissioner of the New York City Department of Corrections; HARVEY PIERCE, JR., Warden, New York City House of Detention for Men; D. MICHAEL PEPE, CLAYTON JEMMOTT AND JOHN KIERNON, Deputy Wardens, New York City House of Detention for Men; and EDWARD I. KOCH, Mayor of the City of New York, individually and in their official capacities,

Respondents,

—and—

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA AND ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court can impose a federal constitutional responsibility on State officials which requires those officials to accept custody of prisoners from local jails within a certain time where State law, which is the sole source of the State officials' responsibility for custody of prisoners, does not require that State officials accept custody within that time.

2. Whether, where the federal courts would lack jurisdiction over an action brought against State officials by local officials because of the State's sovereign immunity, the courts also lack jurisdiction to grant relief against State officials in favor of local officials in order to effectuate federal judgments previously issued against local officials.

3. Whether a federal court can invoke the All Writs Act, 28 U.S.C. § 1651(a), as a jurisdictional basis for an injunction against State officials in order to effectuate a previously entered federal judgment against local officials where no party asserts a federal cause of action against the State officials and there has been no finding of liability against them.

4. Whether an allegation of injury to local jail officials by State officials' actions, in and of itself, can confer on the local officials standing to assert against State officials unasserted claims of local inmates.

PARTIES TO THE PROCEEDING

The petitioners are Mario M. Cuomo, Governor of the State of New York, and Thomas A. Coughlin III, Commissioner of the New York State Department of Correctional Services ("DOCS"). The governmental respondents (hereinafter the "City officials") are the defendants-appellees below, Richard J. Koehler, Commissioner of the New York City Department of Corrections ("NYCDOC"), Harvey Pierce, Jr, Warden of the New York House of Detention for Men ("HDM") operated by NYCDOC, D. Michael Pepe, Clayton Jemmott and John Kiernon, Deputy Wardens of the HDM and Edward I. Koch, Mayor of the City of New York.[1] The five individual respondents (hereinafter the "pre-trial detainees") are the plaintiffs-appellees below, James Benjamin, Miguel Galindez, Bruce Hayes, Jose Saldana and Robert Eschert, who represent the class of pre-trial detainees incarcerated at the HDM.

[1] Pursuant to Rule 40.3, Harvey Pierce, Jr., D. Michael Pepe, Clayton Jemmott, John Kiernon and Edward I. Koch, in their official capacities, are automatically substituted for the original defendant public officers.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioners, Mario M. Cuomo, Governor of New York, and Thomas A. Coughlin III, Commissioner of the New York Department of Correctional Services, respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this action on September 25, 1986.

OPINIONS BELOW

The opinion of affirmance of the court of appeals, dated September 25, 1986 is set forth as Appendix "A" ("App. A") and is reported at 803 F.2d 46 (2nd Cir. 1986). The opinion of the district court, dated March 17, 1986, which held that petitioners could be joined as necessary parties and ordered to accept custody of State ready inmates, is set forth at Appendix "C" ("App. C") and is reported at 629 F. Supp. 713 (S.D.N.Y. 1986).

Five additional opinions concerning petitioning State officials were rendered by the district court. The decision dated November 19, 1980, which denied the City officials' motion to join petitioners as necessary parties, is set forth at Appendix "E" ("App. E") and is reported at 88 F.R.D. 333 (S.D.N.Y. 1980). The decision dated July 29, 1981, which granted the City officials' motion to join petitioners as parties and enjoined them to accept custody of State ready inmates within 48 hours of becoming State ready, is set forth at Appendix "F" ("App. F") and is unreported. The decision dated December 22, 1981, which denied petitioners' motion for a 60 day stay of the court's injunction, is set forth at Appendix "G" ("App. G") and is reported at 528 F. Supp. 925 (S.D.N.Y. 1981). The decision dated October 5, 1983, which held that it was appropriate to order petitioners to house out-to-court inmates, is set forth at Appendix "H" ("App. H") and is unreported. The decision dated April 7, 1984, which held that the court did not possess the jurisdiction to order petitioners to house out-to-court inmates, is unreported. The decision and order dated January 30, 1986, which held that the court had not possessed the jurisdiction to enter an order against petitioners to accept custody of State ready inmates, is set forth at Appendix "D" ("App. D") and is reported at 626 F. Supp. 1264 (S.D.N.Y. 1986).

Other opinions rendered by the district court which do not involve petitioners include the opinion dated August 27, 1980, which held that the pre-trial detainees were entitled to a 1,200 man population cap at the HDM, is reported at 495 F. Supp. 1357 (S.D.N.Y. 1980). The decision dated May 28, 1981, which

denied a motion to intervene by the union representing the various corrections officers in DOCS facilities, is reported at 90 F.R.D. 386 (S.D.N.Y. 1981). The decision dated May 19, 1983, which held that constitutional conditions at HDM could not be maintained if the City officials were relieved from certain portions of the consent decrees, is reported at 564 F. Supp. 668 (S.D.N.Y. 1983). The decision dated November 10, 1986, which granted the City officials' motion to modify, on a temporary basis, certain requirements in the consent decrees, is not yet reported.

JURISDICTION

The order of the United States Court of Appeals was entered on September 25, 1986. This petition for certiorari is filed within the time permitted for filing. This Court's jurisdiction to review the case rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, § 2; The Eleventh Amendment; The Judiciary Act, 28 U.S.C. § 1331; The All Writs Act, 28 U.S.C. § 1651(a); New York Correction Law § 601; New York Criminal Procedure Law §§ 430.20 and 430.30 are reproduced in pertinent part in Appendix "I" ("App. I").

STATEMENT OF THE CASE

The pre-trial detainees' claim against the City officials

In 1975, the pre-trial detainees at the HDM commenced this class action against the New York City officials responsible for the operation of the city's correctional system claiming that various conditions of their confinement violated their federal constitutional rights. Those parties entered into a consent decree in 1979 which contained extensive specific provisions for the operation of the HDM. The decree also contained a stipulation that the HDM was overpopulated and that the pre-trial detainees were entitled to a judgment remedying that overcrowding. The district court then ordered the HDM population

level be reduced to 1200. *Benjamin v. Malcolm*, 495 F. Supp. 1357, 1359, 1365 (S.D.N.Y. 1980). It was not until May 1983 that the court first made a judicial finding concerning the constitutionality of the conditions at the HDM. At that time, the court denied the City officials' motion to be relieved from certain portions of the consent decree on the ground that constitutional conditions at the HDM could not be maintained if the motion were granted. *Benjamin v. Malcolm*, 564 F. Supp. 668 (S.D.N.Y. 1983).

The City officials' litigation against Governor Cuomo and Commissioner Coughlin

In August 1980, the City officials moved to join Governor Hugh Carey and Commissioner Coughlin as indispensable parties. They alleged that inmates in City facilities who had been sentenced to indeterminate terms in State facilities ("State sentenced inmates") were not being received by DOCS "forthwith" as required by New York Criminal Procedure Law §§ 430.20 and 430.30 (McKinney's ed. 1983). The motion was denied because, at the time, the State had received a substantial number of such inmates from the HDM and petitioners had represented to the court that on any given day the number of State ready inmates at the HDM housed for more than 65 days would not exceed 100. *Benjamin v. Malcolm*, App. E4; *Benjamin v. Malcolm*, 90 F.R.D. 386, 386-87 (S.D.N.Y. 1981).

In 1981, the City officials renewed their motion to join Governor Carey and Commissioner Coughlin as parties.[2] The motion

[2] In 1981, the City officials also moved to join the State officials as parties in four other actions: *Forts v. Malcolm*, (S.D.N.Y. 76 Civ. 101) (involving New York City's Correctional Institute for Women ("CIFW")); *Maldonado v. Ciuros*, (S.D.N.Y. 76 Civ. 2854) (involving New York City's Adolescent Reception and Detention Center ("ARDC")); *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, (S.D.N.Y. 79 Civ. 4913) (previously (E.D.N.Y. 73 Civ. 261)); and *Detainees of the Queens House of Detention for Men v. Malcolm*, (S.D.N.Y. 79 Civ. 4914) (previously (E.D.N.Y. 73 Civ. 1364)). That motion was never granted.

was granted, the district court construed the State law term "forthwith" to mean 48 hours, without exception, and ordered Governor Carey and Commissioner Coughlin to accept State sentenced inmates from the HDM within 48 hours of their becoming "State ready".[3] App. F. Petitioners were denied a 60-day stay of the 48 hour order. *Benjamin v. Malcolm*, App. G.

Between January 1982 and September 1983, neither the pretrial detainees nor the City officials gave petitioners notice of any proceedings in this action, including proceedings in which the district court relieved the City officials from the HDM population cap. *Benjamin v. Malcolm*, 564 F. Supp. 668 (S.D.N.Y. 1983). When the pre-trial detainees sought to have the population cap reimposed, the City officials moved to modify the 1981 order against petitioners to require them to accept immediate custody of a number of other categories of persons who were in City facilities.[4] The court granted the motion only with respect to out-to-court inmates in October 1983. Petitioners moved to be relieved from the responsibility of housing out-to-court inmates in March 1984. Over the City officials' opposition, the court vacated its October 1983 order, finding that, under the Eleventh Amendment, it was without jurisdiction. App. C 15.

In February 1985, petitioners moved to be relieved from the court's direction that they accept State ready inmates and to be dismissed as parties. The court granted the motion concluding

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[3] State ready inmates are State sentenced inmates whose processing has been completed. New York Correction Law 601 (McKinney's 1968)

[4] These categories of inmates included all (1) persons convicted of C, D and E felonies who were serving a definite sentence; (2) persons convicted of A and B felonies who had not yet been sentenced; (3) alleged parole violators, i.e., persons who had received either parole or conditional release who had new criminal charges pending against them and had not been able to make bail; and (4) inmates incarcerated in the DOCS system who State court judges had ordered to be produced to appear as defendants or witnesses in State court proceedings ("out-to-court inmates").

that, under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"), it lacked subject matter jurisdiction to enter the orders because they had been based on State law. App. D 7-8. As to the State-ready inmates, however, the court stayed its decision for thirty days, opining that there might exist grounds for relief against the State officials that would not be barred by the Eleventh Amendment. App. D 11.

The City officials' 1986 motion to join Governor Cuomo and Commissioner Coughlin as parties

On February 24, 1986, the City officials again moved to join the Governor and the Commissioner as parties, not only to *Benjamin*, but also to the actions involving ARDC, the Brooklyn HDM, the Queens HDM and CIFW. (See fn 2, at 5). They also obtained a temporary restraining order that petitioners accept State ready inmates within 48 hours. The sole basis set forth for the motion was the joinder provisions of the Federal Rules of Civil Procedure. App. C 3.

The City officials did not claim that the conditions of confinement in its facilities were unconstitutional, but rather claimed that the presence of State inmates—*i.e.*, State readies, adjudicated parole violators and out-of-court inmates—in the City system burdened the City in its efforts to afford detainees the rights secured them by the various consent decrees in the five cases. They did not specify which provisions of which consent decrees the City was unable to comply with by reason of the presence of State readies in its system.[5] Indeed, nowhere in their papers did the City officials refer to any specific court orders. Instead, they alleged in conclusory terms that the presence of large numbers of State inmates—but not specifically State ready

[5] The figures cited by the City officials were that in June 1985 the City housed 546 State inmates, 284 of whom were State readies; in August 1985 there were 875 State prisoners, 423 of whom were State readies; by January 1986 there were 1078 State prisoners, 498 of whom were State readies; and as of February 19, 1986, there were 1200 State inmates in City facilities, 604 of whom were State readies. Affidavit of Jacqueline McMickens at ¶¶12, 15 (Feb. 20, 1986).

inmates – presents the City with serious operational problems, including providing adequate security and other essential services such as visiting, recreation, medical care, food and educational programs. They also alleged that the presence of State inmates adversely affected their construction program because the City has had to devote newly added capacity to house State inmates – again, not specifically State ready inmates. App. C 7-8.

The pre-trial detainees took the position that their constitutional rights had been litigated and that the City officials remain responsible for meeting the terms of the district court's orders. Letter of Theodore Katz, et al. (Mar. 4, 1986).

Governor Cuomo and Commissioner Coughlin opposed the motion on the grounds that the district court lacked jurisdiction and, alternatively, that the City officials failed to meet the established standards for granting a preliminary injunction because Commissioner Coughlin has fulfilled his State law obligation to accept State-ready inmates from local facilities throughout New York State "forthwith."

Petitioners contended that the City officials did not accurately report the number of State ready inmates in NYCDOC because NYCDOC designated inmates as State ready when they were sentenced and before they were completely processed. Copies of DOCS's Weekly Status Reports for 1985 and January and February 1986 which set forth the number of beds available, the number of inmates received from localities and the length of time the inmates had been in local facilities, were submitted as an exhibit to Commissioner Coughlin's affidavit. Commissioner Coughlin's affidavit, without exhibits, is reproduced as Appendix "J" ("App. J"). These reports showed that those designated by NYCDOC as State ready were, with few exceptions, accepted by DOCS within seven to fourteen days.

Petitioners also described for the district court the complicated systems for the classification and movement of inmates in the State facilities which determine the number of beds available for accepting new inmates. App. J 4-7. Petitioners contended

that requiring Commissioner Coughlin to accept inmates from New York City within a short arbitrary time period would severely impair his ability to meet his constitutional responsibility with respect to the conditions of confinement in State facilities. Petitioners demonstrated that, despite the construction of 9,400 new beds in fourteen new facilities, the State system was populated beyond its capacity. Indeed, while the Commissioner was under the district court's mandate, the Second Circuit found that there were serious questions raised concerning the consequences of overcrowding in the DOCS system. *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984). In addition, inmates from Fishkill Correctional Facility brought the first case in federal court which raises claims that the conditions of confinement in a DOCS facility are unconstitutional because of the pressures of overcrowding. *Alston v. Coughlin*, (S.D.N.Y. 85 Civ. 5237). App. J 9-11. Overcrowded conditions in DOCS's facilities were substantially aggravated by New York City's unilateral refusal to house alleged parole violators and the out-to-court inmates for which New York City is responsible under New York law. App. J 11-14.

Finally, petitioners demonstrated that the preference sought by New York City, which is the source of approximately 60% of DOCS's inmates, imposed substantial hardship on the jails of localities outside of New York City. In recent years overcrowding in a number of local facilities outside the City of New York has become acute. Currently, there are three counties involved in federal litigation concerning the conditions of confinement in their facilities. *Badgley v. Varelas*, (E.D.N.Y. CV 80-2916) (Nassau County); *Albro v. County of Onondaga*, (N.D.N.Y. 85-CV-1425) (Onondaga County); *Phillips v. Finnerty*, (E.D.N.Y. CV 82-3385) (Suffolk County). In each of these cases, overcrowding was alleged to have contributed to worsening conditions. In addition to ongoing litigation, DOCS's staff receive frequent complaints from many other counties that their facilities are overcrowded. App. J 8-9.

Although the City officials submitted reply papers, they did not rebut any of petitioners' assertions concerning the

unavailability of space in the State system, or the situation in counties outside the City of New York. Affidavit of Jacqueline McMickens (Mar. 7, 1986). And, while they continued to maintain that they designated inmates as State ready only after processing (id. at ¶3), they did not contest the figures set forth in DOCS's reports establishing that those designated as State ready were accepted by DOCS within seven to fourteen days.

On March 17, 1986, the district court granted the City officials' motion to join petitioners as parties and for a preliminary injunction. The court, however, limited the relief granted to the City officials to the HDM. App. C 16. The court first stated that *Pennhurst II* was distinguishable because that case concerned the liability stage of litigation while this case is in a remedial stage. Therefore, the court held, the claim to be examined was the City's claim "that the State defendants must be joined in order to assure full compliance with the existing decree which assures the plaintiffs protection of their constitutional rights." App. C 5. Because the City could be held in contempt for noncompliance with the court orders, according to the district court, it had standing to ask for relief from being held accountable for actions by the State defendants. App. C 5. The district court recognized that the State's responsibilities are created by State law, but held that this did not defeat jurisdiction because there are numerous instances in which obligations under state law may give rise to a federal claim. App. C 5. According to the district court, it is the All Writs Act which provided a jurisdictional basis for the court to issue an order against State officials to effectuate previously issued orders. App. C 5-6.

The court of appeals affirmed the district court's order, rejecting petitioners' jurisdictional argument that the order was barred by the Eleventh Amendment. The court set forth three bases for reaching this result.

First, the court stated that the refusal of State officials promptly to accept State ready inmates violates a federal interest in vindicating the already-adjudicated constitutional rights of

the pre-trial detainees. App. A 9. Second, the court found that the State had federal constitutional responsibility for the detention conditions of prisoners sentenced to state institutions – prisoners who are not parties to this action, since they are not pre-trial detainees, and whose rights, therefore, have not been adjudicated. The court held that the State had this responsibility despite the fact that these inmates are temporarily housed in City facilities or that a New York statute only requires the State to accept them "forthwith". App. A 10. (See fn. 10 at 15, *infra*.) Third, the court stated that there has been an adjudication of unconstitutionality with respect to the conditions of confinement of the pre-trial detainees – prisoners for whom the court did not find that the State had constitutional responsiblity. Thus, according to the court of appeals, the pre-trial detainees could have joined State officials alleging that state officials contributed to the constitutionally impermissible conditions of confinement. App. A 10-11. Since the City officials are injured by the detainees' failure to seek such joinder, then the City officials are entitled to seek that joinder on the detainees' behalf. The injuries to which the court referred were that the City officials faced contempt sanctions for noncompliance; the City officials would be forced to expend millions of dollars for additional space; and the City officials face the threat of an inmate riot at the HDM, if overcrowding is not alleviated. App. A 15-16.

The court of appeals also found that jurisdiction was properly invoked by the City officials because Fed. R. Civ. P. 19(a) permits joinder of third parties whose absence would prevent the court from granting such relief as is necessary to adjudicate the rights of existing parties and that the court may exercise its residual jurisdictional authority under the All Writs Act, 28 U.S.C. § 1651(a), to enter an order against petitioners. The court stated that resort to the All Writs Act was appropriate under the circumstances of this case where the district court was faced with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions which might be attributed in part to the State and of avoiding the delay that would be entailed in the relitigation of those conditions. App. A 12-13.

The court of appeals referred to the district court's finding that the State's refusal to accept State-ready inmates within forty-eight hours made it impossible for the City officials to comply with the district court's judgment.[6] The court of appeals first stated its agreement with the district court that full relief could not be obtained through an order against the City alone but went on to state that joinder of petitioners was required, since in the court of appeals' view, a remedy ordered against the State system would be less intrusive than a remedy ordered against the New York City system. App. A 14. The court of appeals, like the district court, omitted all mention of the impact on the local systems outside of New York City.[7]

REASONS FOR GRANTING THE PETITION

This petition presents substantial questions of law having a widespread effect on the responsibilities and immunities of State governments which warrant plenary consideration by this Court. The court of appeals, in an unprecedented decision, held that State officials have a federal constitutional responsibility for the conditions of confinement of prisoners who will be confined in State custody despite the fact that these prisoners are presently in the custody of local officials and despite the State statute which prescribes when State officials must accept custody of such prisoners. Whether this constitutes a holding that a State is responsible for the conditions of confinement in local jails or a holding that a State can be ordered to comply with State law when its activity impacts on the conditions of confinement in

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[6] The court of appeals used the language "the State's refusal promptly to accept State-ready inmates". However, the district court made no finding whatsoever about how long it was taking DOCS to accept state-ready inmates and did not address petitioners' contention that inmates designated as State ready were being accepted within seven to fourteen days was unrefuted.

[7] The court below found that the record supports the granting a preliminary injunction because the threat of irreparable harm to the City officials is clear, there are serious questions going to the merits with a balance of hardships in the City officials' favor and the preliminary injunction only preserves a status quo that existed under the 48-hour order issued by the district court in 1981.

local jails, petitioners submit that the court's ruling impermissibly invades State sovereignty.

In either case, the holding establishes a far reaching precedent whose implications extend nationwide. The most recent Annual Survey of Jails by the U.S. Bureau of the Census showed that during the years between 1978 and mid-1984 the local jail population grew forty-six percent while the capacity of local jails rose approximately seven percent. Bureau of Justice Statistics Bulletin: *Jail Inmates 1984*, NCJ 101094, May 1986. Nearly three-fourths of the inmates of the Nation's local jails were housed in jails of at least one hundred inmates. *Id.* Of these jails, twenty-two percent were under court order to reduce their population and twenty-four percent were under court order to improve one or more of the conditions of confinement. *Id.* In addition, of the forty-five states which have both State and local prison systems, all but Alaska and North Dakota have had local jurisdictions involved in litigation concerning the conditions of confinement in their jails.[8] American Civil Liberties Union, National Jail Project: *Jail Litigation Status Report 1985*. While the relief here is presently limited to enjoining State officials to accept custody of prisoners sentenced to incarceration in State facilities within forty-eight hours of the completion of their processing, the holding of the court below that State officials have federal constitutional responsibility for conditions of confinement in local facilities could be read to allow a locality to ask a federal court to order State officials to take whatever action is necessary to rectify unconstitutional conditions in local jails.

Further, the court of appeals' view that the Eleventh Amendment permits a party to obtain relief against State officials without filing an action and asserting a federal claim against them, and solely on the ground that such relief is necessary to effectuate previously issued orders, is one which cannot be squared with decisions of this Court that the Eleventh Amendment bars any federal action against State officials except one

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[8] Connecticut, Delaware, Hawaii, Rhode Island and Vermont have combined jail-prison systems. Bureau of Justice Statistics Bulletin: *Jail Inmates 1984*, NCJ 101094, May 1986.

on federal grounds and prohibits injunctive relief against State officials except an injunction against a violation of federal law. Similarly, the court's holding that the All Writs Act provides a basis for relief in this case goes beyond decisions of this Court that the All Writs Act is only available when a matter arises for which there is a jurisdictional gap and cannot be used as a substitute for a finding of liability. In addition, the holding by the court of appeals that a person facing direct injury has standing to raise another person's claim does not meet with this Court's requirements that before one person can raise another's claim, the first person must establish that it is an effective proponent of that claim and that there is an obstacle to the assertion of the claim by the second person.

Because of the importance of the jurisdictional issues involved, which directly relate to the limits of federal judicial power and to whether that power can be asserted to realign an allocation of responsibility between State and local government, and because this Court has not yet addressed the issue whether the Eleventh Amendment bars a claim against the State as a third party to effectuate orders previously entered against local officials, this petition should be granted.[9]

1. *The decision of the court below that State officials have a federal constitutional responsibility to accept custody of prisoners within a certain time irrespective of the provisions of State law raises significant issues concerning State sovereignty and the limits of federal judicial power.*

The court of appeals asserted *ipse dixit* that the State is responsible for the detention conditions of prisoners who later will be placed in the custody of State officials based solely on the proposition that they are the State's "own prisoners who have been convicted by New York State courts of New York State felonies."

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[9] If certiorari is granted, petitioners reserve the right to argue that the standards for the granting of a preliminary injunction were not met in this case.

According to the court, States are not divested of this responsibility because these prisoners are currently housed in local facilities or because State law prescribes when State officials are required to accept them into custody.

Petitioners submit that they have no such direct obligation. Petitioners contend that the Federal Constitution does not abrogate the prerogative of State legislatures to allocate the responsibility for custody of prisoners convicted under State law.

> 'The King can choose his own prison to detain, as well as his own court to try,' says the court in *The King v. The Bishop of Rochester* (Fortescue Rep., 101). So can the People; but the People must prescribe by law what prison or prisons they may choose.

Brown v. People, 75 N.Y. 437, 439 (Ct. App. 1878).

This Court has repeatedly affirmed that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations and procedures, than the administration of its prisons." *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973); *see also*, *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981); *Bell v. Wolfish*, 441 U.S. 520, 548 (1979); *Pell v. Procunier*, 417 U.S. 817, 827 (1974); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974). Central to that interest is a State's sovereign right to allocate the responsibility for custody of prisoners convicted under its law.

At common law, county and city jails in New York State had custody of all confined persons. The New York State Legislature, in 1796, first authorized construction of State prisons. 1796 N.Y. Laws, c. 30 (republished in 3 Law of New York [1789 to 1796] [1887 ed.]); Society for the Prevention of Pauperism, *Report on the Penitentiary System in the United States*, 14-16 (1822); Klein, *Prison Methods in New York State*, 19, 24-26, 36-37 (1920). Currently, New York law places persons charged with or convicted of a violation of State law in local custody, except that those persons sentenced to indeterminate sentences are to be transferred to DOCS' custody "forthwith." N.Y. Crim. Proc.

Law §§ 430.20 (2) and 430.30 (McKinney's 1983).[10] In short, absent this provision of New York law, petitioners are not responsible for the custody of newly convicted felons. Thus, the State's responsibility is one of State and not federal law.

2. *The decision below, by permitting New York City officials to join State officials as necessary parties to effectuate a previously entered judgment against the City officials, and by allowing a preliminary injunction to be entered against the State officials without a finding that they violated federal law, raises significant issues in regard to the immunity of States to suits in the federal courts.*

In *Pennhurst II*, 465 U.S. at 97-104, this Court reaffirmed the fundamental constitutional principle that the grant of judicial authority set forth in Article III is limited by the sovereign immunity of the States. The Court repeatedly referred to its earlier opinions which stressed the importance of the right of a State not to be sued without its consent. 465 U.S. at 97-104. According to the Court, "federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'", 465 U.S. at 98 (citations omitted), "[t]hat a State may not be sued without its consent is a fundamental rule of jurisprudence ...", *id.*, and "[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate" 465 U.S. at 99-100. The sole exception to this rule

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[10] In *County of Onondaga v. New York State Department of Correctional Services*, 97 A.D.2d 957, 958, 468 N.Y.S.2d 760 (4th Dep't 1983), *aff'd*, 62 N.Y.2d 826, 466 N.E.2d 146, 477 N.Y.S.2d 606 (1984), it was held that " 'forthwith' must be read to mean a reasonable time under the circumstances" and that absent a showing of indifference by DOCS in taking inmates, the court may not set an arbitrary time period. Most recently it was held that accepting custody within fourteen days from sentencing, in the absence of exigent circumstances, was reasonable. *County of Nassau v. Cuomo*, 121 A.D.2d 428, 503 N.Y.S.2d 126 (2d Dept. 1986).

which has been recognized by this Court is a suit challenging the federal constitutionality of a State official's action. 465 U.S. at 102.

In this case, no suit has been commenced against petitioners. To date, no complaint or prior pleadings have been served on petitioners. Rather, the City officials sought to join petitioners, claiming that they were necessary in order for the City officials to fulfill their federal court obligations because of the presence of State prisoners in the City system whom the City officials claimed, as a matter of State law, should be in the custody of the State.[11] Their claim, then is, in fact, solely a State law claim whose hearing and determination by a federal court is barred by the Eleventh Amendment.

The court of appeals concluded that the entry of a judgment against the City officials and in favor of the pre-trial detainees based on the United States Constitution transformed the City officials' state law claim against the petitioners into a claim involving petitioners' federal constitutional responsibilities over which the district court had jurisdiction.[12] Stated simply, the court of appeals held that the district court's jurisdiction did not pend on State law, but rather, pended on the pre-trial detainees' judgment against the City officials and that this pendent jurisdiction is permissible under the line of cases beginning

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[11] Contrary to the statement in the court of appeals' decision, the City officials do not claim that the conditions of confinement in the HDM are unconstitutional by reason of the presence of State ready prisoners.

[12] Specifically, the court below, having held that the State was responsible for the local conditions of confinement of State sentenced inmates, held that the pre-trial detainees could assert a claim that State officials had contributed to the unconstitutionally impermissible conditions affecting them at the HDM. The one does not follow from the other. First, the cases relied upon by the court for this proposition, *i.e.*, *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Pennhurst II*, were cases involving State officials' responsibilities for State facilities. Moreover, in *Pennhurst II*, this Court stated that it was not deciding if the district court had jurisdiction to grant prospective relief. 465 U.S. at 104 n. 13. Second, a pre-trial detainee is not similarly situated to sentenced inmates. *Atiyeh v. Capps*, 449 U.S. 1312, 1315 (1981).

with *Ex Parte Young*, 209 U.S. 123 (1908) and running through *Pennhurst II*. Under this interpretation of that line of authority, the Eleventh Amendment is not a bar to a claim against the petitioners based solely on pendent or ancillary jurisdiction over state law claims so long as the claim is joined to a federal judgment. Under this theory, injunctive relief may be granted against State officials even in the absence of a federal constitutional claim against them. Petitioners submit that this is contrary to the holding of *Pennhurst II* that the doctrine of pendent jurisdiction does not abrogate the Eleventh Amendment. *See also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 250-53 (1985).

Insofar as the court of appeals' holding that the Eleventh Amendment is not a bar because there is a federal interest in vindicating federal judgments can be read as a holding that a judgment itself can provide a jurisdictional basis for a post judgment cross-claim, such a holding is contrary to law. A question arising under a federal court order does not give rise to a federal question. *Oklahoma ex rel. Wilson v. Blankenship*, 447 F.2d 687, 692 (10th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972); *Prairie Band of Pottawatomie Tribe of Indians v. Puckkee*, 321 F.2d 767, 770 (10th Cir. 1963).

Insofar as the court of appeals' holding is read as one that the City officials' claim that they cannot comply with the federal judgments in the absence of petitioners states a separate cognizable claim, that claim does not "arise under the Constitution" as is required by the Constitution, Article III, § 2 and the Judiciary Act, 28 U.S.C. § 1331.

As early as 1824, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824), Chief Justice Marshall declared that a test for determining whether a claim arose under the Constitution was whether the claim turns upon the construction of the Constitution. *See also Shulthis v. McDougal*, 225 U.S. 561, 569 (1912). It is also an established principle that "a suit brought upon a state statute does not arise under ... the Constitution." *Gully v. First National Bank*, 299 U.S. 109, 115-16 (1936). The

City officials' claim against petitioners does not turn on the construction of the Constitution, but only on a construction of State law, *i.e.*, when, under New York Criminal Procedure Law § 430.20, is DOCS required to take custody of State ready prisoners. It is not, therefore, a claim which arises under the Constitution.

In addition to there being no federal claim asserted against petitioning State officials, the relief ordered against them was not based on a finding of unconstitutional activity. The starting point of any review of an injunction against a State official is a recognition that jurisdiction to grant injunctive relief against State officers exists only when the court finds, on the basis of circumstances existing at the time, *see City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Rizzo v. Goode*, 423 U.S. 362, 373 (1976); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974), that the State officer is violating either the United States Constitution or directly applicable federal statutes and when the relief ordered is based on either federal statutes or the federal Constitution. *Youngberg*, 457 U.S. at 319 n. 25; *accord, Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419-20 (1977); *Hutto v. Finney*, 437 U.S. 678, 688 n. 12 (1978). To the extent that State officials are enjoined to act in a way not compelled by the Constitution, the injunction violates the State's sovereign immunity and the dictates of federalism. *Pennhurst II*.[13]

Here, the district court made no finding that current conditions were unconstitutional or in immediate danger of becoming unconstitutional,[14] much less that the forty-eight hour order was closely tailored to any constitutional deprivations.[15] Indeed,

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[13] Even though the court of appeals considered an order against petitioners as a "less extreme" remedy, that does not remove the petitioners' Eleventh Amendment protection. This Court specifically stated that "[c]onsiderations of convenience open no avenue of escape" from the Eleventh Amendment. *Pennhurst II*, 465 U.S. at 123 citing *Missouri v. Fiske*, 290 U.S. 18, 25-26 (1933).

[14]The immediate transfer of convicted felons to the State system is not, in and of itself, desireable. Ideally, an inmate would remain in the City system for

(Footnote continued)

since the City officials presented no record establishing that conditions of confinement were currently unconstitutional and took the position that such was not the case, there was no basis upon which the court could make such a finding. It must be remembered that the burden in establishing that conditions of confinement are unconstitutional is a heavy one. In *Rhodes*, 452 U.S. at 351, this Court instructed federal courts to tread cautiously in finding constitutional violations. *See also Atiyeh*, 449 U.S. 1312; *Rummel v. Estelle*, 445 U.S. 263, 285 (1980). A court must inquire into the specific conditions that are alleged and determine them to be so inadequate so as to "deprive inmates of the minimal civilized measure of life's necessities." *Rhodes*, 452 U.S. at 347; *see e.g., Wolfish v. Levi*, 573 F.2d 118 (2nd Cir. 1978); *rev'd. sub nom. Bell v. Wolfish*, 441 U.S. 520 (1979). The district court, thus, must engage in detailed fact-finding of the specific conditions that are alleged to result from petitioners' actions before considering whether the Constitution has been violated. *See e.g., Lovell v. Brennan*, 566 F. Supp. 672 (D. Me. 1983), *aff'd*, 728 F.2d 560 (1st Cir. 1984). The lack of any such findings here invalidates the preliminary injunction under the Eleventh Amendment.

(Footnote continued)
a few weeks in order to consult with counsel about challenging the conviction and/or sentence, and otherwise wind up family or business matters.

[15] The only rationale given for the forty-eight hours was that it continued the legally imposed status quo. Implicitly, this is a holding that there is a Constitutional requirement that State ready inmates be accepted into State custody within 48 hours. Such a holding conflicts with the holding in *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), where the district court required that the State accept custody of State ready inmates within 30 days. In fact, the only basis for 48 hours was from the district court's erroneous prior holding of state law. See fn. 10 at 15.

3. *The decision of the court below that the All Writs Act [28 U.S.C. §1651(a)] provided a jurisdictional basis for the district court's order against petitioners raises significant issues about the limits of federal judicial power.*

The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1976). The court of appeals found that the All Writs Act provided a jurisdictional basis for the court to issue an order against petitioners to effectuate orders previously issued against the City officials. Petitioners submit that reliance on the All Writs Act in this context is improper for two reasons. First, as a jurisdictional matter, if there is no federal claim, then resort to the Act is inappropriate; and if the City officials' claim were a federal claim, then resort to the All Writs Act is unnecessary. Second, as a substantive matter, this case does not meet the prerequisites for application of the All Writs Act. The finding warrants review by this Court because it constitutes an expansion of the use of the Act beyond that accepted to date by this Court.

If, as petitioners contend, there has been no federal action commenced or federal claim asserted against them, the Eleventh Amendment bars the use of the All Writs Act as a basis for jurisdiction. In *Pennhurst II*, although this Court did not specifically refer to the All Writs Act, it did hold that "neither pendent jurisdiction *nor any other basis of jurisdiction* may override the Eleventh Amendment." *Pennhurst II*, 465 U.S. at 121 (emphasis added) (footnote omitted). And, although Congress can override the Eleventh Amendment by making its intention unmistakeably clear in the language of the statute, the All Writs Act is not an act in which it has chosen to do so. *See Atascadero State Hospital v. Scanlon*, 473 U.S. ____, 105 S. Ct. 3142, 3149 (1985).

If, however, the claim against petitioners involves their federal constitutional responsibilities, as was held by the court of appeals, the Judiciary Act is the specific and historic basis

for obtaining jurisdiction to vindicate the pre-trial detainees' constitutional rights, and the residual All Writs Act cannot be invoked to displace that established basis of jurisdiction. The All Writs Act is only available when, in the context of the case, a matter arises for which there is a jurisdictional gap. If there is no gap, resort cannot be had to the All Writs Act. In *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. ____, 106 S. Ct. 355 (1985), this Court held that the All Writs Act could not be employed to require United States Marshals to transport state prisoners to federal court since writs *ad testificandum* were available. The basis for the holding was that "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses a particular issue at hand, it is that authority and not the All Writs Act which is controlling." 106 S. Ct. at 361.

The court of appeals sought to distinguish *Pennsylvania Bureau of Correction* by relying on this Court's language leaving open the question of the availability of the All Writs Act to authorize an order directing Marshals to transport state prisoners where exceptional circumstances require it. However, this Court specifically held that the exceptional circumstances were those in which it was clearly shown that the traditional writs were inadequate. 106 S. Ct. at 361. Here there was no showing whatsoever that the traditional jurisdictional basis for obtaining relief from unconstitutional conduct was inadequate.

Respondent City officials would not, as a substantive matter, be entitled to relief under the All Writs Act in any event. In *United States v. New York Telephone Co.*, 434 U.S. 159 (1977), this Court considered the question whether a district court may properly order a non-party telephone company to enable federal law enforcement officials to use pen registers. The Court held that the Act did allow a district court to issue such an order. It is this decision upon which the court of appeals relied upon herein. This reliance is unwarranted, however, because, in *New York Telephone* this Court presented several justifications for its decision, none of which apply here.

First, the assistance orders imposed a "meager" burden on the company. 434 U.S. at 174-75. Here, imposing an arbitrary period of 48 hours within which to accept newly sentenced inmates is not a meager burden, either on the State system or on the correctional systems of localities outside New York City. Second, in *New York Telephone*, the FBI could not conduct the investigation without the assistance of the company. 434 U.S. at 175. Here, as the court of appeals recognized, compliance with the district court orders is possible without any orders being directed against petitioners. Finally, in *New York Telephone*, there was no suggestion that use of the All Writs Act was proper because the telephone company was liable under law for the inability of the FBI to complete its investigation. Here, however, use of the All Writs Act has been found proper because petitioners might be liable for the City officials' inability to meet their obligations. Such use of the Act is contrary to the principle of limited federal jurisdiction and, as concerned Justice Stevens when he dissented in *New York Telephone*, is "reading the All Writs Act as though it gave federal judges the wide-ranging powers of an ombudsman." 434 U.S. at 179.

Such use of the Act has been specifically disallowed by this Court. In *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982), the trial court, without finding that the defendant employers had engaged in discriminatory practices, imposed an injunctive remedy against them. *Id.* at 378-82. This Court rejected the argument that the All Writs Act provided a basis for relief against the employers since they were necessary to grant complete relief, holding that the All Writs Act cannot properly be used as a substitute for a finding of liability. 458 U.S. at 402. Here, the All Writs Act cannot be used as a substitute for requiring that the pre-trial detainees obtain a finding that the petitioning State officials violated their constitutional rights.

4. *The decision of the court below that the possibility of injury, in and of itself, is sufficient to give City officials standing to raise claims of pre-trial detainees greatly expands the circumstances under which a party may assert the claims of another contrary to prior decisions of this Court.*

The court of appeals also held that, based solely on the possibility of direct injury resulting from the petitioners' conduct, the City officials have standing to assert the pre-trial detainees' claim that petitioners are contributing to the unconstitutional conditions under which the pre-trial detainees are housed in the City officials' facilities. In so holding, the court of appeals greatly extended the standing requirements as set forth by this Court, substantially increasing the circumstances under which a party can assert the claims of another.

While it is true that a party must establish injury in fact in order to have standing, *Warth v. Seldin*, 422 U.S. 490 (1975), it is not true that this, in and of itself, establishes standing to raise another's claim. The injury which confers standing must relate to the interest meant to be protected by – the zone of interest of – the constitutional right in question, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982), and, in general, that constitutional right cannot be that of some third party. *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

Here, the injury for which the City officials seek relief is not that of the pre-trial detainees and, therefore, does not fall within the zone of interests to be protected by the pre-trial detainees' right to constitutional conditions of confinement. The City officials' claim is, in essence, that the more inmates the City has to house, the more money it will have to spend in order to provide adequate housing and support services. This is not an interest meant to be protected by the constitutional guarantees accorded the pre-trial detainees. Indeed, it is essentially a fiscal claim, a claim which the City cannot raise in federal court against State officials. *See County of Oneida*, 470 U.S. at 250-53.

The court of appeals also based its standing decision in part on the threat that the City officials faced contempt sanctions if they did not comply with the district court's orders. This is simply not so. The legal standard for establishing compliance so as to avoid contempt is substantial, good faith compliance. *Nelson v. Collins*, 659 F.2d 420 (4th Cir. 1981); *Washington Metro. Area Tr. Auth. v. Amal. Tr. Union*, 531 F.2d 617, 621 (D.C. Cir. 1976); *United States v. Swingline, Inc.*, 371 F. Supp. 37, 44 (E.D.N.Y. 1974). It is "[t]he general principle that one is not in contempt for noncompliance with an order he is not capable of performing. . . ." *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 403-04 (9th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); *Washington Metro. Area Tr. Auth.*, 531 F.2d at 621. Therefore, if petitioners are the cause of the City officials' noncompliance, the City officials cannot be held accountable. Accordingly, since the City officials do not face such a threat of injury if based on petitioners' conduct, they lack the requisite injury in fact to satisfy the standing requirements.

In addition, in *Singleton*, this Court looked to two elements to determine if the general prohibition against asserting another's rights should be overcome. First, the Court looked to the relationship between the party seeking standing and the party whose rights are being asserted. The purpose of this inquiry is to ensure that the party seeking standing "is fully, or very nearly, as effective a proponent of the right as the [party whose rights are being asserted]." 428 U.S. at 115. Obviously, given the litigation history of this case and the manifest divergence of interest between jailors and their prisoners, the City officials cannot be as effective proponents of the pre-trial detainees' constitutional rights as the pre-trial detainees would be themselves. Moreover, given the City officials' position that they do not seek to assert the pre-trial detainees' rights, this element of *Singleton* cannot be met. Second, the Court looked to the ability of the party whose rights are being asserted to assert his own rights. If a party is available to assert his own rights, the general rule will prevail. "If there is some genuine obstacle to such assertion, however, the third-party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to

him, and the party who is in court becomes by default the right's best available proponent." *Id.* at 116. Here, as argued above, the is no genuine obstacle to the pre-trial detainees asserting whatever rights they may have – they have simply chosen not to. The City officials, therefore, may not assert those rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
December 24, 1986

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 15—August Term 1986

Argued: September 3, 1986

Decided: September 25, 1986

Docket No. 86-2165

JAMES BENJAMIN, MIGUEL GALINDEZ, BRUCE HAYES, JOSE SALDANA and ROBERT ESCHERT, detainees of the New York City House of Detention for Men, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellees,

—against—

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York; ARTHUR RUBIN, Warden, New York City House of Detention for Men; GERARD BROWN, Deputy Warden, New York City House of Detention for Men; and EDWARD I. KOCH, Mayor of the City of New York, individually and in their official capacities,

Defendants-Appellees.

MARIO CUOMO, Governor of the State of New York, and THOMAS A. COUGHLIN III, Commissioner, New York State Department of Correctional Services,

Third-Party Defendants-Appellants.

Before:

MANSFIELD, PIERCE and PRATT,
Circuit Judges.

Appeal by the Governor of New York and the Commissioner of the New York State Department of Correctional Services from an order of the Southern District of New York, Morris E. Lasker, *Judge*, joining them as third-party defendants in a civil rights action by pre-trial detainees in New York City's House of Detention for Men claiming that overcrowded conditions in the City's facilities violate their constitutional rights and directing the State to accept custody from the City of state prisoners within 48 hours after the prisoners' transfer papers have been processed. Appellants' principal contention is that the district court lacks jurisdiction in view of the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), holding that the Eleventh Amendment bars a federal court from directing state officials to comply with state law. *Held* that *Pennhurst* does not deprive a federal court of jurisdiction under the All Writs Act, 28 U.S.C. §1651(a) (1982), to remedy conduct by the State that violates prisoners' constitutional rights.

Affirmed.

MANSFIELD, *Circuit Judge:*

Governor Mario M. Cuomo and Thomas A. Coughlin III, Commissioner of the New York State Department of Correctional Services (DOCS), who are third-party defendants in this civil rights action by pre-trial detainees under 42 U.S.C. § 1983 claiming that overcrowded prison conditions in the House of Detention for Men (HDM) operated by the City of New York on Rikers Island[1] violate their constitutional rights, appeal from an order of the Southern District of New York, Morris E. Lasker, J., joining them as defendants and directing them promptly to accept custody of each adult male inmate housed in such a City facility, who has been sentenced to a term of imprisonment in a State prison. The court ordered them to accept custody of each prisoner within 48 hours after papers for transfer of the prisoner to a State facility had been completed. The principal contention of the third-party defendants-appellants is that, in view of the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) *(Pennhurst II)*, holding that the Eleventh Amendment is a jurisdictional bar to a federal court order directing state officials to comply with state law, the district court lacked jurisdiction to issue the preliminary injunction and therefore abused its discretion. We affirm.

The history of this lawsuit is long and tortuous, extending over a period of more than 11 years. It has placed extraordinary demands upon Judge Lasker, who has explored the complicated facts with thoroughness and demonstrated unusual skill and patience in evaluating the constitutionality of the substandard conditions of detention found to exist in the City's facilities and in developing with the parties practical methods of alleviating them. Judge Lasker's analyses of the evidence and legal issues are found in a series of published decisions, familiarity with

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[1]The HDM is adjoined by and connected to other detention facilities, C 71 and C 95, and is one of a group of detention facilities which include the Bronx, Queens and Brooklyn Houses of Detention for Men and detention facilities for women and adolescents on Rikers Island.

which is assumed. *Benjamin v. Malcolm*, 495 F. Supp. 1357 (1980); 88 F.R.D. 333 (1980); 528 F. Supp. 925 (1981); 564 F. Supp. 668 (1983); 626 F. Supp. 1264 (1986); 629 F. Supp. 713 (1986). The complaint, which was filed in June 1975, alleges that in violation of 42 U.S.C. § 1983 various officials of the City of New York (hereinafter sometimes referred to as the "City") are responsible for a broad range of conditions at the HDM, which violate the detainees' consitutional rights, including those under the Eighth and Fourteenth Amendments, and seeks appropriate injunctive relief. By various orders entered during the period from July 1975 to July 1977 Judge Lasker enjoined the original defendants from continuing certain conditions found to violate the plaintiffs' constitutional rights, which dealt with contact visits, optional lock-ins, correspondence, discipline, receipt of books, and freedom from forced double-celling in cells built for one prisoner. After a plenary trial during 1976 and 1977, the parties in November 1978 reached a settlement with respect to complained of detention conditions at Rikers Island, Brooklyn, the Bronx and Queens, including uncleanliness, excessive cell confinement, inadequate food service and insufficient access to legal materials. In the spring of 1979 Judge Lasker accordingly approved and entered a Partial Final Judgment By Consent.

In September 1979 the then parties entered into a further stipulation designed to assure that the plaintiffs would be housed under constitutional conditions, which provided that the trial record had established that "[t]he housing blocks at HDM and the institution at large were overpopulated; such overpopulation resulted in an atmosphere of tension and hostility, a strain on all of the institution's facilties, and interference with supervision, protection and provision of services to members of the plaintiff class", *Benjamin v. Malcolm*, 495 F. Supp. 1357, 1359 (S.D.N.Y. 1980). Pursuant to the stipulation, which was approved, judgment was entered to the effect that the conditions at HDM were unconstitutional, with the parties being afforded the opportunity to litigate what would be the appropriate remedy. In an opinion dated August 27, 1980, *supra*, 495 F. Supp. at 1364-65, Judge Lasker found, upon plaintiffs' motion

to reduce the number of inmates at HDM, that "the record establishes that confinement of inmates at HDM has been conducted in such a manner over an extended period as to cause them to endure genuine privation and hardship; it is stipulated that such confinement was unconstitutional in September 1979, and we have found that the condition of unconstitutionality has not been removed." 495 F. Supp. at 1364-65. He further noted that various public and quasi-public bodies, after a long history of studies of HDM, had all concluded that "HDM [had] been dangerously overcrowded for years and [had] recommended that its population be stringently reduced." *Id.* at 1360. He thereupon ordered that the detainee population at HDM be reduced to 1200.[2] *Id.* at 1365.

Simultaneously the plaintiffs moved to join the Governor of New York and the Commissioner of DOCS (hereinafter sometimes referred to as the "State") as necessary third-party defendants on the ground that their refusal promptly to take off the City's hands so-called "state-ready" inmates at HDM (i.e., those who had been convicted of felonies in violation of New York State law and sentenced to more than one year in the custody of the State Department of Correctional Services) prevented the City from complying with Judge Lasker's "population cap" order. On November 19, 1980, the motion was denied without prejudice to renewal if the problem could not be resolved by cooperation on the part of the State. *Benjamin v. Malcolm*, 88 F.R.D. 333, 336.

In June 1981 the City renewed its motion to join the Governor and Commissioner of DOCS as third-party defendants because of the continued overcrowding of HDM attributed to the State's failure "forthwith" to accept "state-readies" from it

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[2]Six months later, in response to the plaintiffs' motion for relief from overcrowded conditions at the Anna M. Kross Correctional Facility, a detention center for women which is also located on Rikers Island, Judge Lasker, acting pursuant to the parties' consent, ordered that a limit be placed on the number of persons detained in other City dormitory facilities.

as required by N.Y. Criminal Procedure Law § 430.20 (McKinney 1983).[3] On August 20, 1981, Judge Lasker issued an order granting the motion and directing the State to accept "state-readies" within 48 hours after their transfer processing had been completed, as required by § 430.20. On December 20, 1981, he denied the State's request for modification of his order finding that the State's failure promptly to take these prisoners off the City's hands strained the latter's facilities beyond constitutionally tolerable limits so that the State was in effect simply seeking to spread the burden of impermissible overcrowding rather than eliminating it. *Benjamin v. Malcolm*, 528 F. Supp. 925, 930. In granting the City's motion and denying the State's cross-motion, Judge Lasker, although accepting the original parties' stipulation that the conditions at HDM were unconstitutional, decided that adequate relief could be granted on the basis of N.Y. Crim. P. Law § 430.20 (McKinney 1983) and, accordingly, in reliance on established jurisprudential principles, concluded that it was unneccessary to base his decision on constitutional grounds, 528 F. Supp. at 929, *Pennhurst II* was not to be decided by the Supreme Court for another three years. Later, in May 1983, after a hearing and visit to the facility, the district judge independently made detailed findings to the effect that the overcrowded conditions of detention at HDM were unconstitutional and denied the City's motion to be relieved from certain portions of the court's earlier decree, ruling that compliance by the City defendants with the orders was essential to the restoration of constitutional conditions. 564 F. Supp. 668. Thus the district court's 1983 finding of unconstitutionality of the conditions at HDM was made long after the State had been ordered to cooperate in alleviating these conditions by promptly

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[3]New York Criminal Procedure Law, § 430.20, provides in pertinent parts as follows:

"§ 430.20 Commitment of defendant

1. In general. When a sentence of imprisonment is pronounced, or when the sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with."

accepting state-ready prisoners. Yet the State took no steps to contest that finding.

Following the district court's August 20, 1981, order containing the 48-hour requirement, the State complied with the order until the summer of 1984 when the City, because it was engaged in a large construction program expected to increase its own correctional capacity, agreed with the State to relax the 48-hour period to 96 hours on the understanding that the State would on January 1, 1985, return to the 48-hour requirement. However, in 1985 the State did not adhere to that requirement and in February 1985 it moved to vacate the August 20, 1981, order on the basis of the Supreme Court's recent decision in *Pennhurst II* holding that the Eleventh Amendment deprived a federal court of jurisdiction to order State officials to comply with state law. In a decision dated January 30, 1986, published at 626 F. Supp. 1264, Judge Lasker granted the motion on the ground that, although the State's conduct may have violated federal law, his "earlier decision explicitly relied on state law only", i.e., N.Y. Crim. P. § 430.20 (McKinney 1983). However, he deferred for 30 days a vacatur of his August 1981 order to enable the plaintiffs to decide whether to seek relief on federal constitutional grounds or from the State courts.

In February 1986, after the State continued to disregard the terms of the August 1981 order, the City again moved to join the Governor of New York and the Commissioner of DOCS pursuant to Fed. R. Civ. P. 19, 20 and 21 and for a preliminary injunction ordering them to accept state-ready prisoners from the City within 48 hours after their transfers papers had been completed. This relief was sought on the ground that the City could not remedy the unconstitutional conditions of confinement at its correctional facilities, which were attributed largely to the State's unwillingness to accept custody of its state-ready prisoners from the facilities, unless the State was ordered to do so by the court. In detailed affidavits, City officials outlined the limitations on the City's detention capacity, despite construction of additional holding space, and furnished statistics indicating that over the previous years the number of state-ready

prisoners in the City's facilities increased sharply whenever the State was not under a court order to accept state-ready prisoners promptly.*

In an opinion dated March 17, 1986, Judge Lasker granted the City's motion to join the Governor and Commissioner as third-party defendants and for preliminary relief, ordering them to accept custody of each state-ready prisoner housed in City correctional facilities with 48 hours after the papers for transfer have been completed. *Benjamin v. Malcolm*, 629 F. Supp. 713. Judge Lasker found that the presence of the State officials as parties in the case was essential to assure protection of the

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*In 1977 the average daily number of state-ready prisoners detained at HDM was 189. Thereafter it steadily increased as follows:

1978	– 226
1979	– 287
Aug. 1980	– 650

By November 19, 1980, when Judge Lasker ruled on the City's first motion to join the State officials as third-party defendants, the State, faced with the prospect of a court order, had reduced the number of state-ready prisoners in City jails to 32, of whom 13 were detained in HDM. However upon Judge Lasker's ruling that an order joining the State as a party was at that time unnecessary because of the State's voluntary action in reducing the number of state-ready prisoners at HDM, the State allowed the number to increase sharply, with the result that by July 1981 the population of state-ready prisoners in the City's facilities grew to 620.

Following Judge Lasker's August 1981 order joing the State third-party defendants and ordering them to accept state-ready prisoners within 48 hours after their transfer papers had been processed, the number of such prisoners in City facilities again declined, reaching an average figure of 57 by May 13, 1985, when the State's motion to vacate Judge Lasker's order was filed. However, with the State's reliance on *Pennhurst II* to relieve it of the August 20, 1981, order and the district court's decision to vacate that order the average daily number of state-readied housed in City facilities increased as follows:

June 1985	– 284
Aug. 1985	– 423
Jan. 1986	– 500 (approx.)
Mar. 3, 1986	– 600 (approx.)

plaintiffs' adjudicated constitutional rights. He concluded that *Pennhurst II* does not prohibit federal courts from issuing relief against state officials when necessary to prevent frustration of a judgment resting on constitutional grounds, as distinguished from state law, and that the All Writs Act, 28 U.S.C. § 1651(a) empowered him to grant such relief as was necessary.

DISCUSSION

The State's principal contention is that under the Supreme Court's decision in *Pennhurst II* the City's third-party claim against State officials must be dismissed as barred by the Eleventh Amendment because the court lacks jurisdiction to order them to comply with state law, i.e., to accept prisoners "forthwith", as the State is required to do by N.Y. Crim. P. Law § 430.20. This contention, however, ignores the district court's finding that the refusal of State officials promptly to accept state-ready prisoners also violates a federal interest in vindicating the already-adjudicated constitutional rights of prisoners housed at the City's HDM. It has long been settled that the Eleventh Amendment does not prohibit a federal court from granting injunctive relief against a state offical acting contrary to the United States Constitution. *Ex Parte Young*, 209 U.S. 123 (1908). This was explicitly recognized by the Court in *Pennhurst II*, 465 U.S. at 105-06, 109 n.17, where the Third Circuit was held to have erred in basing its decision solely on the state officials' non-compliance with a state law, the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Title 50, §§ 4101-4704 (Purdon 1969 and Supp. 1983-84), and the federal constitutional issues were not reached. The Supreme Court, in remanding the case a second time for further proceedings, noted,

> "The District Court also rested its decision on the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973. See *supra*, at 93. *On remand the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases.*" 465 U.S. at 125 (footnote omitted) (emphasis supplied).

In an effort to avoid the impact of the foregoing, the State argues that it has no responsibilities, constitutional or otherwise, with respect to state-ready prisoners other than those imposed on it by New York law. This argument must be rejected, however, for the reason that the prisoners whom it refuses promptly to accept into its prisons are not those of some other state, country or planet, but its own prisoners who have been convicted by New York State courts of New York State felonies. The State cannot therefore wash its hands of its *federal constitutional responsibility* for the detention conditions of such prisoners because they are temporarily housed in City facilities or because a New York statute requires the State to accept them "forthwith". Nor can the State avoid its federal constitutional responsibilities with respect to such prisoners on the grounds that to require it promptly to accept state-ready prisoners from the City will create problems for the State, because of the limited space in its State prisons, in handling the prompt transfer to it by other local communities in New York of state-ready prisoners temporarily held by them.[5] The numerous burdens faced by the State in meeting its constitutional obligations with respect to the housing of its prisoners does not provide it with a legal basis for avoiding those obligations.

Thus, if the plaintiffs in the present action had joined the State officials as defendants, alleging as an independent basis of jurisdiction that the State officials had contributed to the constitutionally impermissible conditions at the City's HDM, the Eleventh Amendment would not bar the issuance of injunctive

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[5]Aside from existing lawsuits claiming overcrowded conditions in the State prison system, *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984); *Alston v. Coughlin*, 85 Civ. 5237 (S.D.N.Y. 1985); *New York State Inspection Security and Law Enforcement Employees, District Council 82 v. Coughlin*, Sup. Ct., Albany Cty., Index No. 7781/82, the State is alleged to have contributed to overcrowding and unconstitutional conditions (inadequate medical care, food, exercise, law libraries, etc.) in a number of other local county facilities in Nassau, Onondaga and Suffolk Counties, which are the subject of separate lawsuits. *See Badgley I and II, infra* (Nassau County); *Albro v. County of Onondaga*, N.D.N.Y, 85 Civ. 1425; *Phillips v. Finnerty*, E.D.N.Y., Civ. 82-3385 (Suffolk County).

relief against them even though their conduct would also violate state law. *See, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (administrators of state mental institution sued under 42 U.S.C. § 1983 are obligated by Eighth Amendment to provide inmates with reasonably safe conditions of confinement, freedom from unreasonable body restraints and minimally adequate training); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984) (where district court's order with respect to confinement conditions had been based on state law, case remanded in light of *Pennhurst II* to determine how much of order could be supported on constitutional grounds). As the Sixth Circuit stated in *Spruytte v. Walters*, 753 F. 2d 498, 514 (6th Cir. 1985):

> "Although Spruytte's claim requires us to consider issues of state law, it does not follow that his claim is barred by *Pennhurst*. Spruytte's complaint alleges a violation of his *federal* constitutional rights. We decline to endorse the proposition that officials may undermine federal court authority by violating state as well as federal law." (emphasis in original).

The State's reliance on *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984) (*Badgley I*), is misplaced. In that case, upon a challenge by inmates of the Nassau County Correction Center to conditions of confinement in that prison the district court, setting a prison population cap at the facility, ordered the New York State Commissioner of Correctional Service to receive certain categories of sentenced inmates and to accept all in excess of the prison population cap. However, unlike the situation in the present case, there was no finding or adjudication that the prison conditions violated the prisoner's constitutional rights.[6]

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[6] The absence of any finding of unconstitutionality in *Badgley I* was emphasized by Judge Newman,

> "In agreeing to specific terms for the operation of the NCCC, the County defendants did not concede that any conditions at the jail falling short of the agreed terms were constitutional violations. The judgment 'resolved' the constitutional issues only in

(Footnote Continued)

Indeed, we expressly left open the question of whether relief might be granted against the State in the absence of such an adjudication. Moreover, we concluded that the presence of State defendants was not necessary for complete relief.

Thus the case is clearly distinguishable from the present suit where there has been an adjudication of unconstitutionality and the State officials have been joined as third-party defendants allegedly contributing to and implementing that violation of the Constitution. *Badgley I*, therefore, does not govern the present case. More recently, in *Badgley II*, _____ F.2d ____, Dkt. No. 86-2035, decided on Aug. 25, 1986, Slip Op. 5369, we noted that the Nassau County Correctional Center officials might well be able to comply with the court's earlier population cap order by applying to the State for an alternative place of confinement for prisoners in excess of the population cap, pursuant to N.Y. Correction Law § 504(1) (McKinney Supp. 1986).

The State contends, however, that even assuming that if the plaintiffs had joined its officials as parties the court would have had jurisdiction to enjoin them from violating the plaintiffs' constitutional rights, no such jurisdiction could be invoked by the City against them as third-party defendants. We disagree. F.R.

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the sense that most consent judgments resolved disputes: It obviated any need to determine whether the claims of constitutional violation were established by substituting for an adjudication of those claims a contractual agreement between the signatories enforceable as a judgment of the District Court upon the Court's approval of the agreement and entry of a judgment. *See United States v. Armour & Co.*, 402 U.S. 673, 681, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). All of the findings made by the Special Master concern the numerous respects in which the conditions at the NCCC were not in compliance with the terms of the consent judgment. To the extent that the District Judge affirmed these findings as constitutional violations, he was in error because no issue of constitutional violation was before him to determine. Whether or not the conditions at the NCCC violate the Constitution, they were found by the Master to violate the consent judgment, and that finding was the only one before the District Court for approval." 729 F.2d at 899.

Civ. P. 19(a)[7] permits the joinder of third parties whose absence would prevent the court from granting such relief as is necessary to adjudicate the rights of existing parties. Although this Rule does not confer jurisdiction upon the court over the City's third-party claim against the State, the court may exercise its residual jurisdictional authority under the All Writs Act, 28 U.S.C. § *1651(a)*, to enter an order against the State. The All Writs Act authorizes a federal court in exceptional circumstances to issue such orders to persons "who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *United States v. New York Telephone Co.*, 434 U.S. 159, 174 (1977) (citations omitted). The circumstances here are exceptional. The district court was faced with the necessity of acting immediately to relieve already-adjudicated unconstitutional conditions which might be attributed in part to the State and of avoiding the delay that would be entailed in the relitigation of those conditions. *Pennsylvania Bureau of Correction v. United States Marshals Service*, _____ U.S. _____, 106 S. Ct. 355, 361 (1985), relied upon by the State, is therefore distinguishable and would not in any event deprive the court of any jurisdiction it might possess under more specific statutory grants of authority, e.g., 28 U.S.C. §§ 1331(a), 1343. Nor is this a case where that Act is being used to by-pass or supersede the constitutional limitations of the Eleventh Amendment, *see In re Baldwin-United Corporation*, 770 F.2d 328, 340 (2d Cir. 1985), since that amendment does not preclude relief based on federal constitutional grounds, *Ex parte Young*, *supra*.

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[7] F.R. Civ. P. 19(a) provides in pertinent part:

"**Rule 19. Joinder of Persons Needed for Just Adjudication**

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, . . . If he has not been so joined, the court shall order that he be made a party."

In the present case, after extensive litigation the district court has found that the State's refusal promptly to accept state-ready prisoners in the City detention facility may contribute to the unconstitutional overcrowding and makes it impossible for the City to comply with the district court's judgment against it in the plaintiffs' favor. Full relief against these unconstitutional conditions cannot, therefore, be obtained through an order against the City alone but requires, because of the State's refusal promptly to accept state-ready prisoners, joinder as third-party defendants of appropriate State officials. When such a "less extreme" remedy is available the court is not obligated to resort to more draconian measures against the City alone, such as enjoining it from arresting or prosecuting distributors of the narcotic "crack", or ordering it to release detainees earlier than at present or on more liberal bail terms, or to refuse to accept detainees when to do so would exceed a population cap. *See Ruiz v. Estelle*, 679 F.2d 1115, 1145 (5th Cir.) (In context of prison administration, courts should "fashion 'the least intrusive remedy that will still be effective.' " (footnote omitted)), *amended in part, vacated in part on other grounds*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 149 (3d Cir. 1977) ("federal equitable relief must be carefully tailored to be no more intrusive than is necessary"); *Gates v. Collier*, 407 F. Supp. 1117, 1121 (N.D. Miss. 1975) ("[N]o court is bound to invoke draconian measures [when] . . . less drastic [measures] . . . seem[ ] more likely to produce satisfactory results."). Faced with a situation parallel to that before us in the present case, the Sixth Circuit in *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), held *Pennhurst II* inapplicable since the overcrowded prison conditions in county detention facilities had been found to be unconstitutional, not merely a violation of state law (Kentucky Rev. Stats. § 532.100). Accordingly, the court permitted the joinder of Kentucky State officials as third-party defendants upon the application of defendant county prison officials sued by prisoners, because the refusal of the former to accept state prisoners in a timely fashion contributed to the unconstitutional conditions

of confinement in the county facilities and joinder of the state officials was essential for an effective remedy. The present case confronts us with a similar scenario.

The State next argues that the order against it, if based on federal constitutional grounds, denies it fundamental fairness since the State has not had a full opportunity to litigate the issue of whether the prison conditions allegedly contributed to by it have been unconstitutional. The State officials, however, have been third-party defendants in the action since 1981 pursuant to Judge Lasker's August 1981 order except for a short period after his January 1986 order of dismissal. During that long period it does not appear that the State was ever denied the opportunity to challenge the federal constitutional basis of the underlying consent order or the findings of unconstitutionality made by Judge Lasker in 1983. More important, the State does not presently offer any proof tending to dispute the existence of the conditions relied upon by Judge Lasker as the basis of his findings of unconstitutionality. Lastly, since the injunctive relief issued by the district court is preliminary, nothing prevents the State from offering rebuttal proof upon trial of the case for final relief. Indeed there is little doubt that, upon a trial relative to appellees' application for a permanent injunction, the State will be afforded the opportunity to address whether its activities actually contributed to the adjudicated unconstitutional conditions and to offer evidence that such unconstitutional conditions do not exist.

The State's next contention, that even if its officials could be joined as parties on grounds of contributing to unconstitutional conduct the City lacks standing to press the claim against them, needs little discussion. As a party facing direct injury from the State's alleged conduct, the City meets standing requirements. *See Craig v. Boren*, 429 U.S. 190, 194 (1976); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). It faces contempt sanctions for noncompliance with the district court's order. It would be forced to expend millions for additional detentional space if the State refused promptly to receive state-ready prisoners, and in the meantime it would lead to the threat of another major riot at HDM due to

overcrowded conditions. These conditions suffice to confer standing on it. *Board of Education v. Allen*, 392 U.S. 236, 241 n.5 (1968); *Regents of University of Minnesota v. National Collegiate Athletics Ass'n*, 560 F.2d 352, 363-64 (8th Cir. 1977); *Akron Board of Education v. State Board of Education of Ohio*, 490 F.2d 1285, 1289 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974).

In conclusion, the record supports the existence of conditions meeting well-established standards for issuance of preliminary relief, *see Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1152 (2d Cir.), *prob. juris. noted*, 106 S. Ct. 3270 (1986), and there is no showing that Judge Lasker abused his discretion in granting it. The threat of irreparable harm to the City is clear. The City has demonstrated a likelihood of success or at least serious questions going to the merits with a balance of hardships in its favor. The preliminary injunction simply preserves a status quo that existed for years after the district court's August 1981 order.

The order is affirmed.

ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, DATED MARCH 27, 1986, APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES BENJAMIN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the CITY OF NEW YORK, et al.,

Defendants,

– against –

MARIO CUOMO, et al.,

Third-Party Defendants.

75 Civ. 3073 (MEL)
ORDER

On February 24, 1986, this Court issued a Temporary Restraining Order, requiring the third-party defendants to accept custody of each person housed in correctional facilities of the City of New York who is sentenced to a term of imprisonment in a State facility within forty-eight hours after the papers for transfer have been completed. As part of said order, this court issued an order to show cause why a preliminary injunction should not be issued. The Temporary Restraining Order was continued pursuant to Fed. R. Civ. Proc. until March 16, 1985.

Having considered the affidavits of Leonard Koerner, dated February 20, 1986 and March 6, 1986, and Jacqueline McMickens, dated February 20, 1986 and March 7, 1986, in support of the motion; and the affidavit of Thomas A. Coughlin,

III, in opposition thereto; and having heard oral argument on March 7, 1986 and having considered the foregoing and the affidavits and briefs filed herein, the Court finds:

1. That the Court has jurisdiction over the subject matter of this application;

2. That the defendants have raised sufficiently serious questions going to the merits to make them a fair ground for litigation; and

3. That the failure to grant the preliminary relief requested by the defendants will cause them irreparable harm; and

4. That the balance of hardship tips decidedly toward the defendants.

Now, Therefore, in accordance with the foregoing findings, and for the purpose of preserving the status quo, it is Ordered, Adjudged and Decreed:

The Governor of the State of New York and the Commissioner of the State Department of Correctional Services are joined as third-party defendants in the above captioned action, pending a determination whether they should be retained permanently as defendants; and

The third-party defendants, and all persons acting by, through under, or by or through their order be, and are hereby ordered, pending a final determination of the defendants' application, to accept custody of each male adult person housed in correctional facilities of the City of New York who is sentenced to a term of imprisonment in a State facility within forty-eight hours after the papers for transfer have been completed.

Dated: New York, New York
March 27, 1986

s/ Morris E. Lasker

U.S.D.J.

OPINION OF THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, DATED MARCH 17, 1986, APPENDIX C

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75 Civ. 3073 (MEL)

JAMES BENJAMIN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al.,

Defendants,

– against –

MARIO CUOMO, et al.,

Third-Party Defendants.

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76 Civ. 2854 (MEL)

ERNESTO MALDONADO, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al.,

Defendants.

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79 Civ. 4913 (MEL)

DETAINEES OF THE BROOKLYN HOUSE OF DETENTION FOR MEN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al.,

Defendants.

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79 Civ. 4914 (MEL)

DETAINEES OF THE
QUEENS HOUSE OF DETENTION FOR MEN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM,

Commissioner of Corrections of the
CITY OF NEW YORK, et al.,

Defendants.

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76 Civ. 101 (MEL)

IOLA FORTS, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections
of THE CITY OF NEW YORK, et al.,

Defendants.

LASKER, D.J.

The history of this much litigated case involving the overcrowding of New York City jails is set forth in numerous prior decisions, *see Benjamin v. Malcolm*, 564 F. Supp. 668 (S.D.N.Y. 1983); *Benjamin v. Malcolm*, 528 F. Supp. 925 (S.D.N.Y. 1981); *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980); *Benjamin v. Malcolm*, 88 F.R.D. 333 (S.D.N.Y. 1980). On January 30, 1986, in the most recent decision in this action, we granted the motion of Governor Mario Cuomo and Thomas A. Coughlin III, Commissioner of the New York State Department of Correctional Services ("the State defendants") to vacate this court's August 20, 1981 order requiring the State defendants to accept "state ready"[1] inmates within forty-eight hours. In moving to vacate the order the State defendants asserted, and we concluded, that under *Pennhurst State School and Hospital v. Halderman*, ____ U.S. ____, 104 S. Ct. 900 (1984) *("Pennhurst II")* the Court lacked subject matter jurisdiction to order the relief against the State defendants because, as we found, the August 20, 1981 order clearly had been based upon state law.[2] *See Benjamin v. Malcolm*, No. 75-3073, slip op. at 12 (S.D.N.Y. Jan. 30, 1986). However, because we also concluded that there might exist grounds for relief against the State defendants that would not be barred by the Eleventh Amendment we stayed the effect of the January 1986 decision for thirty days to permit the Commissioner of Correction of the City of New York and the various other City officials who are defendants (collectively "the City" or "the City defendants") to assert such grounds if the facts permitted. *Id.* at 14.

On February 24, 1986 the City moved by order to show cause to join the State defendants pursuant to Federal Rules of Civil Procedure 19, 20 and 21. The order to show cause, signed by the court on that day, included a temporary restraining order requiring the State Commissioner "to accept custody of each person housed in correctional facilities of the City of New York who is sentenced to a term of imprisonment in a State facility within forty-eight hours after the necessary papers for transfer have been completed." Alternatively, the City moved for a preliminary injunction for the same relief in the event that its

its motion was not disposed of before the temporary restraining order became ineffective. The State Commissioner cross-moved to vacate the mandatory temporary restraining order because it "extends beyond the ten days allowed for in F.R.C.P. 65(b). . . ."[3]

I. JURISDICTION

The State defendants argue that the court does not have jurisdiction even to consider the motion to join them because, it is claimed (1) the Federal Rules of Civil Procedure do not provide a jurisdictional basis; (2) the City cannot assert a claim against the State defendants based upon the plaintiffs' constitutional rights; and (3) the obligations of the State defendants, if any, arise solely from state law.

Citing *Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984), the City defendants maintain that the "State officials' presence in the litigation is necessary because their absolute control over the State readies . . . has a direct impact on the City's ability to manage its facilities . . . to comply with . . . this Court's prior orders," and that such relief is not barred by the Eleventh Amendment.

Simply stated, the jurisdictional issue is whether *Pennhurst II* prohibits federal courts from ordering relief against state officials whose actions may be necessary to implement, or at least to avoid the frustration of, a judgment that rests on a determination of a constitutional violation. Without, for the moment, reaching the question whether such relief is justified, we conclude for the reasons set forth below that *Pennhurst II* does not prohibit granting relief in such cases.

The important, but simple rule of *Pennhurst II*, is that a federal court may not order a state official to conform his conduct to state law. "A federal court," the *Pennhurst II* majority stated, "must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment." *Pennhurst II*, 104 S. Ct. at 919.

The State defendants apparently interpret this language as requiring examination of each "cause of action" which is asserted. They maintain that since the only cause of action which the City may bring against the state officials is one based upon state law, the conclusion follows, according to the State's argument, that *Pennhurst II* bars the City from requesting any relief against them. However, the rationale is inapplicable because, unlike the facts in *Pennhurst II*, which concerned the liability stage of that litigation, the plaintiff-inmates in this action already have obtained a judgment securing their constitutional rights. Accordingly, the "claim" to be examined, in this case in its present posture, is the City's assertion that the State defendants must be joined in order to assure full compliance with the existing decree which assures the plaintiffs' protection of their constitutional rights. Moreover, in the case at hand the City is the party which would suffer contempt penalties for noncompliance with court orders limiting inmate population in the event those limits were exceeded. Thus, the City has standing to request relief from being held accountable for actions by the State defendants over which it has no control but which allegedly cause or contribute to violations of the Court's orders.

Nor is the fact that the State defendants' responsibilities in the first instance are created by state law sufficient to defeat jurisdiction. Numerous situations are recognized by our federal legal structure in which obligations under state law may give rise to a federal claim. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests cognizable under the Constitution "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .").[4]

Furthermore, the United States Supreme Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act [28 U.S.C. § 1651(a)] as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. . . ." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977).

> The power conferred by the Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, . . . and encompasses even those who have not taken any affirmative action to hinder justice [citations omitted].

Id. at 174.[5]

Jurisdiction in this case was "obtained" in the first instance, as the result of plaintiffs' claims under 42 U.S.C. § 1983 *et seq.* Further, although no "basis of jurisdiction may override the Eleventh Amendment," *Pennhurst II* at 919, in this case reliance on the All Writs Act as a basis for further jurisdiction does not conflict with the Eleventh Amendment since the order at issue does not rest upon state law grounds. Of course, invoking the extraordinary basis for jurisdiction provided by the All Writs Act should not be a casual undertaking. *Cf. General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 401 (1982) ("There was no need for the District Court to treat petitioners as strangers to this lawsuit, and therefore to rely upon some extraordinary form of process or writ to bring them before the court.") However, if it is concluded that the presence of state officials is necessary for the full satisfaction of constitutional rights, joining them in the litigation is, in our view, not only consistent with the purpose of the All Writs Act, but also with the reasoning underlying the exception to the Eleventh Amendment which was created in *Ex parte Young*, 209 U.S. 123 (1908), namely, "to promote the vindication of federal rights" and "hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst II*, 104 S. Ct. at 910.

Finally, we observe that in a case such as this, in which the defendant alleges that the third partys' actions prevent the defendants from fulfilling the plaintiffs' constitutional rights, a conclusion that *Pennhurst II* barred joining state officials for the purpose of assuring a remedy for a constitutional wrong would result in the anamolous situation in which the state courts could

fully address a federal constitutional deprivation but the federal courts could not.

II. INJUNCTION

The prerequisites to the grant of a preliminary injunction are that (a) there is a showing of irreparable harm and (b) either a (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardship tipping decidedly toward the party requesting the preliminary relief. *Roso-Lino Beverage Distributors, Inc. v. Coca-Cola Bottling Co. of New York, Inc.*, 749 F.2d 124, 125 (2d Cir. 1984) (per curiam); *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

We conclude that those requirements have been met by the City defendants.

A. Irreparable Harm

As the Court of Appeals for the Second Circuit has recently stated, "[t]he linchpin of such interim relief is that threatened irreparable harm will be prevented by [an] injunction." *Buckingham Corporation v. Karp*, 762 F.2d 257, 262 (2d Cir. 1985).

The City defendants assert that by June 1985 the number of state ready inmates began to climb and that as of March 7, 1986, the date of the hearing on its motion, there were more than 500 state readies housed by the City. According to the City "as of [that date] the number of State readies presently housed by the City in violation of this Court's forty-eight hour order would fill the new White Street jail." Affidavit of Leonard Koerner at ¶ 4 (Mar. 7, 1986). The City further maintains that in the absence of the relief it seeks it would not be able to estimate the number of state readies it could be required to house hereafter and therefore cannot adequately plan for its short and long term needs; that it has to devote approximately fifty percent of its newly added space (which has nearly doubled the City's capacity since 1979) to house state inmates and that a significant percentage of the state inmates are state readies; that the presence of large

numbers of state inmates affects the City's ability to maintain its physical facilities and to plan for future construction; and that the presence of the state inmates creates serious operational problems for the City correctional facilities, affecting such areas as security, visiting, recreation, medical care, food, appropriate housing and educational programs. Affidavit of Jacqueline McMickens at ¶¶ 5, 16-22 (Feb. 20, 1986).

The State defendants vigorously challenge the City's method of computing the daily numbers of state readies housed in City facilities. According to the State defendants' calculations, for example, there were only approximately 250 state ready inmates in the City jails on March 7th. Moreover they argue that the fluctuation of the City's inmate population is caused by certain, predictable seasonal factors, such as the fact that the number of inmates paroled increases during the November-January holiday season.

The City has accounted for the seasonal rise and fall of the inmate population. Furthermore, the fact that the number of state readies in the City jails may fluctuate to a greater or lesser degree depending on the season does not eliminate the significance of the state readies' presence. In any event, despite the argument as to the correct calculation of population, it is undisputed that the numbers of state readies in the City system has averaged in the hundreds.

The claim that such varying numbers wreak havoc with a municipality's ability to manage its facilities and interfere with the on-going planning and building process in which the City is currently engaged is persuasive, and monetary damages cannot adequately compensate the City (nor the plaintiff class) for the continuing injury. In short, the City has met its burden of showing irreparable harm.

In this connection it is worthy of note that the City only seeks continuation of the status quo: that is, the continuance of an order that has been in effect in this case for almost five years. It is true that the City defendants' submissions on the motion make reference to various other categories of state inmates

housed in City facilities which allegedly are contributing to its dilemmas.[6] However, the reply affidavit of Leonard Koerner states, "The City's request merely continues the Court's ruling of July 29, 1981 requiring the State to accept State readies within forty-eight hours after their processing has been completed." Affidavit of Leonard Koerner at ¶4 (Mar. 4, 1986). We accept this statement as accurately characterizing the relief requested at this time. In such a factual context the City is not required to meet the more stringent showing of irreparable harm that might be required to justify changing the status quo. *See Doe v. New York University*, 666 F.2d 761, 773 (2d Cir. 1981).[7]

B. The Seriousness of the Questions Presented

Badgley v. Varelas, 729 F.2d 894 (2d Cir. 1984) decided shortly after the determination in *Pennhurst II*, involved a consent judgment that was entered by agreement between inmates at the Nassau County Correctional Center ("the NCCC") and various Nassau County Officials ("the County defendants"). After a Special Master found that the County defendants had continually violated the consent decree, the plaintiffs moved for, and the Court granted, injunctive relief which involved the use of State facilities.

Because the District Judge was of the opinion that the terms of the order could not be carried out without the cooperation of the State Commissioner (who was not then a party to the litigation) the Court directed plaintiffs "to serve a copy of the injunction [which included a specific direction to the Commissioner to lease to Nassau County any institution under his jurisdiction to accomodate a certain class of inmates] upon [the State] Commissioner." *Badgley v. Varelas*, 729 F.2d at 898. The District Court later granted a motion by the County defendants to join the State Commissioner as a party-defendant and for leave to file a cross-claim against him. All of the parties appealed.

The Court of Appeals held (1) that neither the Special Master's findings nor the District Court's order was an adjudication of a constitutional violation; (2) that a ban on intake was the

appropriate relief and that such relief could "also serve the salutary purpose of forcing all of the various state and local agencies who either have a need to place people in confinement or the responsibility for providing detention facilities, or both, to face up to the challenge of making alternative arrangements," *id.* at 902; and (3) that in view of the availability of such a remedy, "in light of the non-acquiescence of the State defendants in the consent judgment and the advent of *Pennhurst II*," it was inappropriate to order relief against the State defendants at that time." *Id.* at 901. However, the *Badgley* court specified that its decision left open the question "[w]hether *Pennhurst II* leaves any room for a District Court decree directed against state officials whose actions may be necessary to implement, or at least to avoid the frustration of, *a judgment that does not rest on a determination of a constitutional* violation. . . ." *Id.* (emphasis supplied).

The State defendants argue that *Badgley* bars the granting of relief in this case. However, as we read *Badgley*, it is distinguishable from the case at hand.

First, *Badgley's* unanswered question is not precisely the issue in this litigation because here, unlike *Badgley*, the population cap *was* set as a result of the court's determination of a constitutional violation. *See Benjamin v. Malcolm*, 495 F. Supp. at 136. Since the judgment here *does* rest on a constitutional violation we believe that, by implication *Badgley* holds that *Pennhurst II* does not bar federal jurisdiction and, in any event, the case at hand is more compelling than the hypothetical case left open in *Badgley*.

Second, the facts here are substantially different from those of *Badgley*. For example, it appears that in *Badgley* the State was merely a passive party which owned facilities which Nassau County wished to use whereas here the City alleges that the State defendants are actively preventing the City from meeting its obligations. Further, to the extent that *Badgley* may be read to suggest that the court stay its hand if cooperation between the governments involved will solve the problem, a philosophy which we share, *see Benjamin v. Malcolm*, 88 F.R.D. at 336

(denying without prejudice the City's motion to join the State defendants because it appeared the State and the City would be able to resolve their differences without the court's intervention), the historical facts of this litigation establish that court orders have been necessary because of a lack of cooperation. *See Benjamin v. Malcolm*, Transcript at 129 (July 29, 1981) (granting the City's motion to join the State defendants); *see also Benjamin v. Malcolm*, 528 F. Supp. 925 (S.D.N.Y. 1981) (denying the State defendants' motion to be relieved temporarily from the order requiring the State to accept state ready inmates within forty-eight hours); Stipulation of the parties entered into Sept. 7, 1984 (acknowledging parties' agreement to expand the time within which the State was required to accept state-readies from forty-eight to ninety-six hours).

In sum, *Badgley*, as we read it, does not foreclose the relief sought by the City defendants. At the least it is clear that the issues raised raised as to the proper construction of *Pennhurst II* and *Badgley* raise sufficiently serious questions going to the merits to make them a fair ground of litigation.

3. Hardship

As set forth in the affidavit of the State Commissioner the State's current procedure for taking state readies from City facilities into its own system is based upon the number of beds that the State officials predict will be available for the following week. In the past, due to the court order requiring the State to accept state readies within forty-eight hours the State has given priority to inmates housed in New York City facilities over those housed in other jails throughout the State. However, the State defendants assert that the state system is currently overcrowded, that the State is under pressure from other localities to collect State inmates from their facilities, and accordingly, that it would be an undue and unfair burden to require the State to continue giving priority treatment to the City.

The City stresses that the present levels and fluctuations of state inmates is interfering with the City's ability to manage its facilities. Although the City defendants do not assert that

the current number of detainees violates the existing decree, it does maintain that the situation created by the presence of the state inmates places the City eyeball to eyeball with violating the existing decree as to population limits and that the City should not be required to wait until a violation of the decree actually exists before it is granted protective relief.

As indicated above, this Court has been confronted on various occasions with the necessity of weighing the relative hardships facing the State and the City, in determining whether to grant relief requested by one of the parties. We recognize the difficulties facing both. What was stated in 1981 remains true today:

> No one who has dealt with the chronic difficulty of prison or jail overcrowding can fail to be sensitive to its human implications, and to the pain which it imposes on inmates, and correctional personnel, alike. Moreover, it is important to remember that the State inmates and correctional personnel are just as human, and suffer just as much when impermissible overcrowding occurs, as do City inmates and personnel.

Benjamin v. Malcolm, 528 F. Supp. at 929.

Balancing the equities between the two governments has not been made simpler by the passing of time. Nevertheless, upon scrupulous evaluation of the facts we conclude that the balance of hardship does tip decidedly toward the City.

Several of the conclusions that we have previously reached remain valid today. They include:

> 1. As to public safety: . . . overcrowding is a serious threat to the security of both State and City institutions. However, State institutions are remote from population centers and its maximum security institutions are walled and protectable. City institutions are massed together in the center of population of New York City and without such physical features as walls.

> 2. As to the relative impact of the court's decision on the respective systems: it remains an inescapable fact that the State Correctional system is nearly three times as large as the City's and that the relative impact on the State of additions to its population of 200-300 people will therefore be proportionately less. Moreover, the impact can be diffused among many other institutions than would be true in the City system. . . .
>
> 3. As to the difference between conditions in detention centers in general and prisons in general: it remains true that a prison population is generally more stable and manageable than the population of a jail.

Id. at 929-30.

Finally, while an injunction continuing the requirement that the State accept state inmates within forty-eight hours will continue the State's burden, it does not, in the present posture of the case, increase it, while denying the injunction would leave the City vulnerable to the possibility, if not probability, of a very significant increase in its inmate population.

III. JOINDER

Joining the State defendants as parties is appropriate under Rule 19 "if (1) in [their] absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 19. If, as the City asserts, the number of state readies is determined to be over 500, "the presence of State prisoners in such large numbers [would] constitute an insurmountable roadblock to the fulfillment of the City's obligations." *Benjamin v. Malcolm*, 88 F.R.D. at 334. The City's motion therefore is appropriately brought. It is true that determination of whether the State defendants will be retained permanently as defendants in the action must await the disposition of the dispute as to whether the State's actions or proposed actions do or would hereafter place the City in a position of noncompliance with the court's decrees. At the present time however the State defendants' presence in the litigation is required, at a minimum, to dispose finally

of the fact questions raised by the City defendants' motion. Further, since (1) we have concluded that *Pennhurst II* is not a bar to jurisdiction over the subject matter of the action, (2) joining the State defendants is "feasible", and (3) the Governer and State Commissioner are subject to service of process, all of the prerequisites for joinder under Rule 19 are met.

The City's motion for a preliminary injunction is granted.[8]

Submit decree on notice.

Dated: New York, New York
March 17, 1986

MORRIS E. LASKER

U.S.D.J.

FOOTNOTES

1. The State defendants assert:

> "A State ready inmate is one who has been sentenced to a state institution, whose court commitment papers have been completed, whose fingerprints have been recorded, whose fingerprint cards have been filled out, whose presentence report has been completed, whose medical history, psychiatric reports, disciplinary record, history of assaults, riots, etc., has been collected and put together in a packet and whose local facility is capable of delivering the inmate to a state reception center."

Affidavit of Thomas A. Coughlin at ¶ 10 (Mar. 5, 1986).

2. By order of April 25, 1984 a prior order requiring the State defendants to house out-to-court inmates also was vacated under *Pennhurst State School and Hospital v. Halderman*, __ U.S. __, 104 S. Ct. 900 (1984) (*"Pennhurst II"*).

3. Fed. R. Civ. P. 65(b) states in relevant part:

> Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

4. Indeed, when taken to its logical extreme, the State defendants' argument that their obligations arise only under state law would preclude even plaintiffs from asserting a constitutional claim against the State defendants based upon their alleged contribution to the overcrowding. *Pennhurst II* compels no such result.

5. The City defendants do not raise the All Writs Act, 28 U.S.C. § 1651(a), as a basis for jurisdiction but the plaintiffs have made this argument in their letter brief submitted in response to the State defendants' motion to vacate the August 20, 1981 order.

6. The dispute between the City and the State concerning the City's housing parole violators is part of a suit currently being litigated in the Supreme Court of the State of New York.

7. The City moves to join the State defendants in five actions: *Benjamin v. Malcolm*, No. 75-3073, *Maldonado v. Malcolm*, No. 76-2854, *Detainees of the Brooklyn House of Detention for Men v. Malcolm*, No. 79-4913, *Detainees for the Queens House of Detention for Men v. Malcolm*, No. 79-4914 and *Forts v. Malcolm*, No. 76-101. However, the forty-eight hour order in the past has only been in effect in *Benjamin v. Malcolm* and will not be extended beyond its previous scope at this time. If the City seeks relief in the several other cases a further submission should be made that clearly indicates the relief sought since the current papers do not do so.

8. Disposition of the State defendant's motion not to join Governer Cuomo because he is not the State official responsible for directing the relief sought is deferred because the City has not briefed the issued.

OPINION OF THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, DATED JANUARY 30, 1986, APPENDIX D

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75 Civ. 3073 (MEL)

JAMES BENJAMIN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Correction of the CITY OF NEW YORK, et al.,

Defendants,

– against –

MARIO CUOMO, et al.,

Third-Party Defendants.

LASKER, D.J.

This class action concerns overcrowding in the House of Detention for Men on Rikers Island ("HDM"). Three years after relief was granted against the state defendants in this case, the United States Supreme Court decided the landmark case of *Pennhurst State School and Hospital v. Halderman*, ____ U.S. ____, 104 S. Ct. 900 (1984) ("Pennhurst II"), holding that federal courts have no jurisdiction to enjoin state officials on the basis of a state law violation. Relying on that authority, Governor Mario Cuomo[1] and Thomas A. Coughlin III, Commissioner of the New York State Department of Correctional Services ("the State defendants") move to vacate the order of August 20, 1981 requiring the State to accept "state ready" inmates within forty-eight hours after processing and to dismiss the State defendants on the ground that this Court lacks subject matter jurisdiction. For the reasons set forth below, the motion is granted.

On September 28, 1979 Benjamin J. Malcolm, Commissioner of Correction of the City of New York, and other City officials (collectively "the City defendants" or "the City") entered into a "Stipulation for Entry of an Order" with the inmates "to secure plaintiffs' rights to be housed under constitutional conditions." By opinion dated August 27, 1980[2] it was held on the basis of the parties' stipulation that HDM was unconstitutionally overcrowded and, on the basis of additional evidence presented, the City was ordered not to house more than 1,200 inmates at HDM. *Benjamin v. Malcolm*, 495 F. Supp. 1357 (S.D.N.Y. 1980).

Although the City defendants conceded that HDM was overcrowded, they took the position early in the litigation that the overcrowding was partially attributable to the presence of inmates who properly should have been in the State's custody and that the State's failure to assume responsibility for the confinement of the inmates was restricting the City's ability to comply with court orders. By order to show cause on June 4, 1981 the City moved to join the State defendants as indispensable parties pursuant to Fed. R. Civ. P. 19 and 20.

After evaluating what we determined were the controlling factual considerations the City's motion was granted.[3] Moreover, relying upon the prudent jurisprudential approach of not deciding constitutional questions when an adequate state law basis for relief exists, we concluded that New York law clearly obligated the State to do what the City was requesting:

> There is no doubt that the situation in the state system is a grave situation, as it also is in the city system. However, with regard to the question of legal obligation of the parties it is the legal obligation of the state to remove state readies forthwith, as the statute says [referring to N.Y. Crim. P. Law § 430.20 (McKinney 1982)].

Transcript at 129 (July 29, 1981)

The State defendants were instructed to accept inmates from HDM within forty-eight hours of their becoming state readies, and on August 20, 1981 an order was issued to that effect.[4] It is this order which the State defendants seek to vacate through the instant motion.

The State defendants argue that the 1981 order must be vacated because *Pennhurst II* prohibits a federal court from ordering state officials to comply with state law and that the Eleventh Amendment permits a federal court to enjoin the actions of state officials only when the officials are acting unconstitutionally. In this case, they maintain, the only assertion that the United States Constitution has been violated is plaintiffs' Eighth Amendment claim against the City, and there is no cause of action by either plaintiffs or the City against the state for depriving the plaintiffs of their constitional rights. Moreover, citing such classic decisions as *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), and *Warth v. Seldin*, 422 U.S. 490 (1975), the State defendants argue that the City is precluded from raising such a claim because it lacks the requisite standing to do so.

The City defendants vigorously contest the State's construction of *Pennhurst II*. Relying primarily on our suggestion in a previous decision that the State's behavior may be of constitutional significance,[5] the City answers that "this Court's determination to join the State defendants and to impose a remedy against them was designed to effectuate the constitutional rights of the plaintiffs and secondarily involved a discussion of state law." Defendants' Memorandum of Law at 7 (Feb. 27, 1985). *Pennhurst II*, as the City interprets it, is not controlling where, as here, the State defendants' presence in the litigation is needed to promote the vindication of federal rights.

Plaintiffs, on the other hand, view the dispute as one between the City and the State and have not formally responded to the motion except to submit a letter-brief in which they substantially agree with the City's analysis of the law and the background facts. The heart of plaintiffs' position was expressed as follows:

> Our consistent concern in this litigation has been compliance with this Court's Orders that require constitutionally acceptable population levels in the City jails, regardless of the outcome of disputes between the City and State regarding their respective responsibilities for various categories of inmates. The outcome of the pending motion should not, we believe, have any bearing on the City's liability under those Orders.

Letter of Theodore H. Katz, et al. (Feb. 28, 1985). Plaintiffs have never asserted any claims against the State defendants and have indicated that they have no present intention of doing so.

A.

Resolution of the issue at hand requires a determination as to the reach of *Pennhurst II*. Any such analysis would be incomplete without consideration of that litigation's history.

In *Pennhurst II* mentally retarded citizens brought a class action against various Pennsylvania state and county officials

challenging the fact and conditions of their institutional confinement. The District Court held that the conditions of Pennhurst State School and Hospital violated plaintiffs' rights under the Eighth and Fourteenth Amendments, Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. § 794 (1976 & Supp. V), and the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., tit. 50 §§ 4101-4704 (Purdon 1969 & Supp. 1982).

The Court of Appeals for the Third Circuit substantially affirmed the District Court's ruling, 612 F.2d 84 (3d Cir. 1979) (en banc), but grounded its conclusion that plaintiffs had a right to habilitation in the least restrictive environment solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6010 (1976). The Supreme Court reversed the judgment of the Court of Appeals holding that 42 U.S.C. § 6010 did not create any substantive rights. The case was remanded to the Court of Appeals "to determine if the remedial order could be supported on the basis of state law, the Constitution, or Section 504 of the Rehabilitation Act." *Pennhurst State School & Hospital v. Halderman*, 451 U.S 1, 31 (1981).

On remand the Court of Appeals never reached the remaining issues of federal law, instead concluding (en banc) that the state statute fully supported its earlier judgment. 673 F.2d 647 (3d Cir. 1982). In upholding the prior judgment the Court of Appeals rejected the State defendants' arguments that the Eleventh Amendment barred a federal court from considering the State law claim. Relying on *Silver v. Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) ("an important case in the development of the doctrine of pendent jurisdiction," *Pennhurst II*, 104 S. Ct. at 905), the Court of Appeals determined that the Amendment did not bar a federal court from granting prospective relief against state officials on the basis of a pendent state-law claim:

> The Supreme Court's remand for further consideration of the federal constitutional questions establishes

> as law of the case for this court the substantiality of the federal question supporting jurisdiction.

673 F.2d at 658-59.

The Supreme Court disagreed. *Pennhurst*, the Court reasoned, was distinguishable from the doctrine of *Ex parte Young*, 209 U.S. 123 (1908) (federal court may enjoin state official from enforcing unconstitutional statute), because unlike *Young*, the need to reconcile the promotion of the supremacy of federal rights with the constitutional immunity of the States "is wholly absent . . . when a plaintiff alleges that a state official has violated *state* law." *Pennhurst II*, 104 S. Ct. at 911 (emphasis in the original). The Court accordingly concluded:

> a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when -- as here -- the relief sought and ordered has an impact directly on the State itself.

Id. at 917.

Further, rejecting plaintiffs'-respondents' numerous public policy arguments,[6] the majority held that

> neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment. A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment . . . We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

Id. at 919.

* * * * * *

The sweeping prohibition pronounced in *Pennhurst II* appears even stronger when one considers that the decision struck

down federal jurisdiction on Eleventh Amendment grounds in the face of federal constitutional and statutory claims asserted by the plaintiffs and despite the district court's finding that plaintiffs' Eighth Amendment rights, the right to due process and rights under various federal laws had been violated. Beyond question, *Pennhurst II* significantly restricts the authority of a federal court to order relief against state officials. The facts in the case before us do not fall squarely within the holding of the decision. Nevertheless, for the reasons set forth below, we conclude that the decision is controlling and that it compels vacating the August 20, 1981 order.

In the instant action, the plaintiffs' successfully adjudicated constitutional claims were not asserted against the state defendants. It is true that, as in *Pennhurst II*, there were significant federal questions lurking in the background when the City moved to join the State defendants in the litigation. However, in granting the motion we explicitly stated our reliance upon state law as providing the legal basis for granting the relief.

Moreover, since our consideration of the State defendants' role was in the context of a motion pursuant to Fed. R. Civ. P. 19 the standard was whether complete relief could be granted if the state defendants were absent from the litigation. A determination that the City could not fulfill its obligations to avoid violating the plaintiffs' constitutional rights without some action by the state may be *evidence* that the State defendants' conduct carried constitutional ramifications. However, it is not an *adjudication* that "the acts or omissions of the State defendants have caused or contributed to a violation of the constitutional rights of the plaintiffs to a degree sufficient to provide a basis for relief against the State defendants." *Badgley v. Varelas*, 729 F.2d 894, 901 n.8 (2d Cir. 1984).

Absent such an adjudication, acceptance of the City's argument would establish jurisdiction on a basis that is perilously close to the holding of the Third Circuit Court of Appeals in its (second) consideration of *Pennhurst*. The Court of Appeals there held that pendent *claim* jurisdiction empowered the Court to grant relief against the state defendants. In the present posture

of the case at hand ordering relief against the state officials would be analogous to establishing jurisdiction on a pendent *party* basis.[7] Both propositions lack the nexus between the state defendants and a federal violation which *Pennhurst II* apparently requires. In any event, the Supreme Court rejected the proposition that the "judge-made doctrine" of pendent (claim) jurisdiction was not susceptible to the Eleventh Amendment's prohibitions. *Pennhurst II*, 104 S. Ct. at 919. The conclusion applies with equal force to the doctrine of pendent party jurisdiction: "neither pendent [claim] jurisdiction, *nor any other basis of jurisdiction* may override the Eleventh Amendment." *Id.* (emphasis supplied);[8] *see Oneida County, N.Y. v. Oneida Indian National of New York State*, ____ U.S. ____ , 105 S. Ct. 1245, 1260-61 (1985).

B.

Both parties rely on *Badgley v. Varelas*, 729 F.2d 894 (2d Cir. 1984), to support their respective positions. The *Badgley* plaintiffs, a group of inmates at the Nassau County Correctional Center ("NCCC"), settled their dispute by agreeing with the County defendants to entry of a consent judgment specifying the remedial action that would be taken to alleviate overcrowding. Thereafter, the District Court ordered local and state officials to transfer inmates out of the NCCC to secure compliance with the terms of the consent judgment. However, on appeal, since the State defendants had not agreed to the entry of the consent judgment; there had not been an adjudication that any state official had violated the plaintiffs' constitutional rights; there was an adequate remedy that could be directed solely to the parties who signed the consent judgment; and the Supreme Court (in *Pennhurst II*) had just rendered a "significant opinion circumscribing the authority of a District Court to enjoin state officials from acting in violation of state law" [citation omitted] the Court of Appeals of this Circuit held that it was "inappropriate [for the District Court] to order any relief [against the state officials] at this time." *Badgley v. Varelas*, 729 F.2d at 901.

There are obvious factual similarities between *Badgley* and the present lawsuit. However, interpreting that decision as holding that a district court may not enter "state ready" orders against state officials unless plaintiffs claim that the officials have violated their constitutional rights, as the State defendants do, stretches the language in the opinion too far. Certainly the Court of Appeals recognized *Pennhurst II*'s potential impact on the *Badgley* litigation. But the Court deliberately refrained from filling in the interstices of the Supreme Court's newly rendered decision. Indeed, the *Badgley* Court specifically declined to decide

> [w]hether *Pennhurst II* leaves any room for a District Court decree directed against state officials whose actions may be necessary to implement, or at least to avoid the frustration of, a judgment that does not rest on a determination of a constitutional violation.

Id. It is this open question which the City defendants urge us to resolve in their favor.

The City defendants correctly point out that the Supreme Court distinguished *Pennhurst II* from *Ex parte Young*, 209 U.S. 123, on the basis that ordering relief against the state officials in *Pennhurst II* would not promote the vindication of federal rights. Relying on this distinction they argue that this action falls under the *Young* doctrine (and that it is therefore not barred by the Eleventh Amendment) because here the State defendants' actions significantly contributed to the violations of plaintiffs' constitutional rights.

The City's argument may well have merit.[9] Nevertheless, the question is not whether the argument has merit but whether it is the basis upon which our earlier decision depended -- and it is not. The earlier decision explicitly relied on state law only. It would not be proper to substitute, *nunc pro tunc*, a determination that the State defendants violated the plaintiffs' constitutional rights, except upon full litigation of that question. No such cause of action has been asserted. Nor has there been a determination that the state officials' actions are so inexorably

tied to the constitutional violation that the court has jurisdiction to order relief. This, we conclude, is the minimum that *Pennhurst II* requires. *Cf. Tate v. Frey*, 735 F.2d 986, 990 (6th Cir. 1984) (per curiam) (requiring the district court to make findings of fact consistent with *Pennhurst II* before issuing a permanent injunction against state officials).

C.

Tate v. Frey, 735 F.2d at 986 does not alter our conclusion in this regard. In *Tate*, state correction official defendants appealed from the grant of a preliminary injunction requiring them to reduce the number of convicted felons who were incarcerated in the county jail and were awaiting transfer to state facilities, and enjoined the State defendants from permitting any convicted felons to remain in the jail for more than thirty days from the imposition of sentence.

The Court of Appeals for the Sixth Circuit held that the grant of an injunction did not constitute an abuse of discretion and that *Pennhurst II* did not render the injunction improper.

> It is obvious . . . that the district court premised the grant of the preliminary injunction upon constitutional grounds and not state law. Acknowledging that the preliminary injunction, by its very nature is merely interlocutory, the district court should be extended the opportunity to develop more fully the facts and circumstances peculiar to the case *sub judice* when the motion for permanent injunction against the third party defendants is heard, taking into consideration the impact of the Supreme Court's decision in *Pennhurst* upon any permanent relief the district court may deem appropriate.

Tate v. Frey, 735 F.2d at 990.

This case is readily distinguishable from *Tate* because here, the August 20, 1981 order was grounded upon N.Y. Crim. Proc. Law § 420.30. Moreover, since the Tate appellate court abstained from "any comprehensive discussion or review of the

merits of the case beyond the bare essentials necessary to determine if the trial court exceeded reasonable discretion in rendering preliminary relief," *id.*, to characterize *Tate* as holding that *Pennhurst II* is inapplicable when the actions of the State defendants affect constitutional rights is at least premature.

D.

Throughout the litigation we have stated that it is not apparent that the City will be able to fulfill its obligations without an order from the court directing the State defendants to take some action. Our decision should not be construed as abandoning that sentiment or as expressing the opinion that all means through which the City may obtain appropriate relief are foreclosed. We have not held, nor do we now, that acts or omissions which frustrate the vindication of a federal right can never be significant enough to create a sufficient basis for jurisdiction over state officials.

Plaintiffs, of course, are not precluded from seeking relief from the state. *See Badgley v. Varelas*, 729 F.2d at 901. Regardless of the plaintiffs' stance, Fed. R. Civ. P. 19 contemplates that under certain circumstances a district court may order the joinder of adverse parties, *see, e.g., Macklin v. Butler*, 553 F.2d 525, 531 (7th Cir. 1977); *accord Sitchenko v. Diresta*, 512 F. Supp. 758, 763 (E.D.N.Y. 1981), or dismiss an action in the event that an indispensable party cannot be joined, *Envirotech Corporation v. Bethlehem Steel Corporation*, 98 F.R.D. 250 (S.D.N.Y. 1983), *aff'd*, 729 F.2d 70 (2d Cir. 1984), and the City may wish to explore whether a request for such relief would be appropriate.

Since there are options remaining which may operate to bring the State defendants back into the lawsuit if they were to be presently dismissed, it is appropriate to defer vacating the order of August, 1981 for thirty days pending a determination of the parties' further intentions. *Cf. Pennhurst II*, 104 S. Ct. at 921 (remanding for consideration of federal claims).

The motion is granted; vacatur of the August 20, 1981 order and dismissal of the State defendants is stayed for thirty days from the filing of this Memorandum.

It is so ordered.

Dated: New York, New York
January 30, 1986

/s/ MORRIS E. LASKER
U.S.D.J.

FOOTNOTES

1. Mario Cuomo in his official capacity has been substituted for his predecessor pursuant to Fed. R. Civ. P. 25(d)(1).

2. An earlier motion to join the State defendants was denied without prejudice because it appeared at the time that the State and the City would be able to resolve their differences through the State's voluntary cooperation. *See Benjamin v. Malcolm*, 88 F.R.D. 333, 336 (S.D.N.Y. 1980).

3. The consideration included:

   "The question of public safety;
   The relative impact of the Court's decision on the respective systems;
   The relative efforts of the systems themselves to discharge their duties and to solve the problems;
   The relative physical space available to the systems, both in terms of beds and in terms of acreage;
   The existence of programs or their future availability;
   The difference between conditions which exist in detention centers in general and prison in general."
   Benjamin v. Malcolm, 528 F. Supp. 925, 929 (S.D.N.Y. 1981).

4. Shortly thereafter the State defendants moved to be relieved temporarily from the order's mandate. The motion was denied on several grounds: (1) that there existed no legal justification for releasing the State defendants from their obligations since they had not met the standard of *United States v. Swift & Co.*, 286 U.S. 106 (1932), for relief from a judgment pursuant to Fed. R. Civ. P. 60(b)(6) and because the obligations from which the State sought release were established in the first instance, not by the August 20th judgment but by the N.Y. Crim. P. Law § 430.20 (McKinney 1983); (2) that re-examination of the factors first enumerated in the opinion of July 29, 1981 revealed no change in the factual circumstances which justified granting the motion; and (3) finally, the motion was denied because:

> in the last analysis what the State proposes here is to equalize unconstitutionality by requiring the City to share the burden of impermissible overcrowding with the State. The remedy does not lie in equalizing the unconstitutionality but in eliminating it.
>
> *Benjamin v. Malcolm*, 528 F. Supp. at 929-30.

5. *See* n.4, *supra*.

6. Plaintiffs-respondents argued that " 'considerations of judicial economy, convenience, and fairness to litigants' that underlie pendent jurisdiction [citation omitted] counsel against a result that may cause litigants to split causes of action between state and federal courts; . . . that the policy of avoiding unnecessary constitutional decisions will be contravened if plaintiffs choose to forego their state-law claims and sue only in federal court or, alternatively, that the policy of *Ex parte Young* will be hindered if plaintiffs choose to forego their right to a federal form and bring all of their claims in state court." *Pennhurst II*, 104 S. Ct. at 919.

7. The reference to "pendent party" jurisdiction is only an analogy because Fed. R. Civ. P. 19 cannot provide subject matter jurisdiction where it does not otherwise exist.

8. In view of this statement it is doubtful that the All Writs Act, 28 U.S.C. § 1651 (1982), may override the Eleventh Amendment. *In re Baldwin-United Corporation*, 770 F.2d 328, 340 (2d Cir. 1985) ("The All-Writs Act . . . cannot be used to circumvent or supersede the constitutional limitations of the Eleventh Amendment.")

9. We have uncovered no decision which answers this argument directly. There is support for the proposition that *Pennhurst II* is not a bar when State conduct violates *both* State and federal law. *See David D. v. Dartmouth*, 775 F.2d 411 (1st Cir. 1985); *Geis v. Board of Education*, 774 F.2d 575 (3d Cir. 1985); *Barnes v. Cohen*, 749 F.2d 1009 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2126 (1985); *Students of California for the Blind*, 736 F.2d 538 (9th Cir. 1984).

OPINION OF THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, DATED November 11, 1980, APPENDIX E

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75 Civ. 3073 (MEL)

JAMES BENJAMIN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al.,

Defendants.

LASKER, D.J.

The defendants (collectively the City) move under Rule 19, Fed. R. Civ. Pr., to join the Governor of the State of New York and the State Commissioner of Correctional Services as defendants. It is the City's claim that in the absence of the Governor and the Commissioner as party defendants, the court cannot grant complete relief among those already parties.[1]

In particular, the City argues that it cannot meet its obligation to reduce and control population at the House of Detention for Men on Rikers Island, as required by various orders of this court, unless the number of prisoners which the State of New York houses at HDM is limited or controlled by the court. At the time that this motion was filed (August 21, 1980), the large number of State prisoners being housed at HDM, (either persons being processed for permanent incarceration in State facilities or alleged State parole violators) beyond question created so acute a problem for the City as to render it nearly impossible for the City to meet the court's orders. This state of affairs has come into existence fairly suddenly over the recent past. For example, in 1977, the average daily number of State readies at HDM totalled 189. In contrast, during the first five months of this year the average daily number rose to 460 and on July 17, 1980 reached 657, in addition to 140 alleged parole violators. When it is considered that the most recent order of this court required that the population at HDM be limited to 1200, it is obvious that the impact of the presence of State prisoners in such large numbers constituted an insurmountable roadblock to the fulfillment of the City's obligations. There is no doubt, therefore, that the City's motion under Rule 19 was appropriately brought. Nor is there any question that the Governor and State Commissioner are subject to service of process, that their joining is "feasible" and will not deprive the court of jurisdiction of subject matter of the action (all prerequisites for the application of Rule 19 joinder). In sum, as the facts stood at the time the motion was made, the City stated a compelling case for joining the Governor and State Correction Commissioner.

In making this statement we do not ignore the points of opposition asserted by the State in its answer to the motion: that the City is responsible for the population levels at HDM and has the ability to remedy the problem; that the joinder of the State parties at this stage of the proceedings would be unduly prejudicial and might violate due process of law and finally, that the court should abstain because determination of the motion might require interpretation of a state statute which has not been construed by the Courts of New York.

We find these arguments unpersuasive. It is true that, as indicated in prior opinions of this court, the City is obligated to provide minimally acceptable population levels and that the City has extra spaces within the buildings of the HDM complex (other than HDM) which can be refurbished so as physically to accommodate the number of inmates by which the HDM population must be reduced. However, it does not follow that complete relief can be granted to the parties in the absence of the State officers, since without some assurance as to the number of State prisoners who may be housed at HDM, the City cannot exercise control of its own compliance with this court's orders.

Nor do we find merit in the State's argument that the joinder of the Governor and the Commissioner at this stage of the proceedings would be unduly prejudicial or violate due process of law. The matters which have already been decided by the court have not involved the State in any way and, if joined, the State would be fully represented before the court in any future determination which would affect its interests.

Finally, we disagree with the State that the court should abstain from deciding the motion because determining it might require interpretation of the State's obligation to house prisoners under § 430.30 of the Criminal Procedure Law of New York. The sole item of statutory construction which that interpretation might require would be to determine what the word "forthwith" means in the statute. This is not the kind of question that requires the specialized expertise of the State courts.

Accordingly, as we have indicated above, had the facts not changed since the bringing of this motion, it would have been granted. Yet the very filing of the motion appears to have spurred constructive responses on the part of the Governor and the Commissioner with the result that as of November 3rd, there were only 32 State "readies" in the New York City Correctional System of whom only 13 were housed at HDM. Moreover, since the end of September, 1980, no State ready in New York City custody has had to wait for acceptance at Ossining Correctional Facility or Elmira Correctional Facility (to which many or all State readies are sent from HDM). (Stipulation of the parties dated November 5, 1980) Furthermore, by affidavits dated September 26th, October 9th and October 22nd filed in this case, the State Commissioner has represented to the court that he will use his best efforts to assure that on any given day the number of State-ready inmates housed at HDM for more than 65 days does not exceed 100 and that he is "attempting to arrive at a reasonable balance between the assurances desired by the City and what I think I can realistically expect to perform in light of this agency's own inmate capacity."

The City does not consider these assurances adequate to permit it to plan for future operations, and we understand its reasons for that view. Nevertheless, the fact that such a small number of State readies is now being held at HDM together with the State Commissioner's commitment to do everything possible to control the future number of State readies held at HDM, prompt us to conclude that joinder of the Governor and State Commissioner at this time is not necessary. We stress the phrase "at this time" because although the motion is denied, it is denied without prejudice to renewal by the City in the event that the number of State readies held at HDM or any pattern of increase in such numbers appears to threaten the City's ability to comply with the orders of the court and thereby threatens the ability of the court to grant full relief to the parties.

In sum, we believe that if the problem can be solved by the voluntary cooperation of the State, there is an advantage to such a disposition. It will obviate the necessity of judicial intrusion

into State governmental affairs and avoid the additional complication of this litigation, which might occur if the State were to be a full participant in all future proceedings. Nevertheless, if the problem cannot be solved on the basis of the State's cooperation, the court stands ready to grand the necessary relief.

The motion is denied without prejudice.

It is so ordered.

Dated: New York, New York
November 19, 1980

MORRIS E. LASKER
U.S.D.J.

FOOTNOTE

1. Rule 19 states in relevant part:

"Rule 19. Joinder of persons needed for just adjudication.

(a) PERSONS TO BE JOINED

If feasible . . . a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action, shall be joined in the action if 1) in his absence complete relief cannot be accorded among those already parties."

OPINION OF THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, TRANSCRIPT DATED JULY 29, 1981, APPENDIX F

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75 Civ 3073
76 Civ 2854
79 Civ 4913
79 Civ 4914
76 Civ 101
(MEL)

JAMES BENJAMIN, et al.,

Plaintiffs,

v.

BENJAMIN J. MALCOLM, et al.,

Defendants.

New York, New York
July 29, 1981
10:00 a.m.

(Hearing resumed)

— — — — — —

THE COURT: I am prepared to make a ruling in this case with some minor exceptions and loose ends I think I will have to discuss with counsel after I have finished giving my statement here.

I am doing this from the bench the day after the hearing in view of the immediacy of the problem to all concerned. Although everybody in the courtroom is aware of the facts, I think it is worth putting it in perspective by recalling almost a year ago the city asked for approximately the same relief they are asking for now, and in my denial of their motion at that time I wrote as follows.

"In particular, the City argues that it cannot meet its obligation to reduce and control population at the House of Detention for Men on Rikers Island, as required by various orders of

this court, unless the number of prisoners which the State of New York houses at HDM is limited or controlled by the court.

"At the time that this motion was filed" -- that is last year -- "the large number of State prisoners being housed at HDM beyond question created so acute a problem for the City as to render it nearly impossible for the City to meet the court's orders."

Persons present will recall that the only reason this motion was denied -- that is, the motion to join the state as a party in this litigation -- at that time was the assurances given by the Commissioner of Corrections of the State of New York and the Governor, or the Governor through the Commissioner, that the situation would be remedied voluntarily.

The situation was remedied voluntarily for a certain period of time but of course has recurred and here we are again.

The factual background today is almost identical to what it was a year ago, and the question now reduces itself not to whether the state should be subject to the jurisdiction of the Court but as to which system should bear the burden under current circumstances.

In analyzing the situation I have concluded that the decision is to be made based on at least the following factors:

First, the legal obligations of the parties.

Secondly, the question of public safety.

Third, the relative impact of the Court's decision on the respective systems.

Fourth, the relative efforts of the systems themselves to discharge their duties and to solve the problem that we are all faced with.

Fifth, the relative physical space available to the systems, both in terms of beds and in terms of acreage.

Sixth, the existence of programs or their future availability.

Finally, a factor that I think is important to consider, the difference between conditions which exist in detention centers in general and prisons in general.

On the basis of these factors, and I will enumerate their applicability to the case, there seems to be no doubt but that the present application of the city must be granted.

However, though I say "must be granted," I think we must review the questions of whether the 48-hour period is the appropriate period or not and after I have concluded my remarks here I would like to meet with counsel in chambers to discuss that point.

There is no doubt that the situation in the state system is a grave situation, as it also is in the city system. However, with regard to the question of legal obligation of the parties it is the legal obligation of the state to remove state readies forthwith, as the statute says. I believe it is Section 430.20 of the criminal procedure law.

With regard to the question of public safety, I have indicated both publicly and at informal meetings that I have no desire to attempt to avoid a riot in one institution simply to produce one in another, and I am mindful of the fact that the whole state has suffered a grievous riot at Attica.

It is also worth reminding those present, and the public, that the city has suffered riots at Rikers Island which but for the grace of God would have turned out to be just as serious as the ones at Attica, and I was present personally at the Rikers Island riot and, from what I have read about the Attica riot, am aware of the commonality of the tensions that existed in both situations.

But there is this to be said about the riot threat, and I quote to some extent Commissioner Ward yesterday: It is the fact that Rikers Island is an urban prison or prison facility. While it is separated by some fast flowing water and it is not easy for people to get to it is after all right in the middle of an urban environment. It is not protected by the walls, watchtowers, and

so on, that some state prisons, maximum security, are protected by. In brief, the state prisons on the whole are more secure and they are more remote and if we have to deal with the grisly possibilities,the likelihood of tragedy is more limited in the environment of such institutions than it is when we deal with a question of metropolitan detention centers.

Next, as to the impact which my ruling will have on the respective systems, we start with the proposition that the state has a capacity of 23,000 whereas the city has a capacity of 9000. So that the impact of the absorption of five, six or seven hundred persons is two and a half times as great for the city as it is for the state, or, put in reverse, is two and a half times less burdensome for the state than it is for the city.

It is also appropriate to point out that we are dealing here with the rights of the persons in question, namely, those in custody, and that to the extent that either class should be favored it seems to me appropriate in law to favor the detainee who has not been convicted over the person who has been convicted of an offense.

Coming next to the question of the relative efforts of the system, I want to make it clear that I believe that both systems are working very hard to solve this problem and it is not a question of allocation of praise or blame, but I have concluded that the city has stretched to its very limit. There really is almost nothing more that I think the city can do, outside, of course, of "building more facilities or working out an arrangement by which less people are sent to Rikers Island or more people are released from Rikers Island, but insofar as housing of people, I am persuaded the city is doing everything it can at the moment.

The state is doing everything it can, except that, of course, for reasons that I understand thoroughly, and so does everybody else, they have reserved, for example, the extra space available at Attica in the hope that the inevitable won't require them to use it.

As far as I can see, we have come to the point of no return, and there simply is no choice. There is a very difficult choice

that has to be made. I am conscious of my responsibility in the situation, but for reasons which I earlier explained, I think that that space will have to be utilized if we are forced to that, which we apparently are.

Coming to the question next of relative physical space, first of all, as I have just pointed out, there is at least a little space available in the state system, and none available at the moment in the city system.

Secondly, as to space for building, which probaly will be necessary or may well be necessary for both systems in the future, there is ample space available for both, but certainly it cannot be said that there is any shortage for the state to build if they have to even on existing sites.

Next, as to programs or the availability of programs, while I understand that if 400 people more, 300 people more, are put, for example, into Attica, there would be no presently existing program for them, it seems to me that it is much easier to create programs in a prison institution or prison setting than it is in a detention center setting.

First of all, the facilities are more crowded in a place like the institution at Rikers Island. I am not talking about beds, but actual physical space.

And secondly, the population is so transient that the fabrication or creation of programs is inherently difficult.

I don't want to underestimate the problems of the state authorities but I think that they are somewhat less difficult than they are for those who run detention centers.

Finally, I think it fair to point out, and I think I am correct in saying it, that penologists generally agree that conditions in prisons are in general more stable than they are in detention centers. Whether this is because a convicted prisoner population being aware of precisely what its future is going to be has an ability to plan and is reconciled to the future, whereas in detention centers the aura of uncertainty hangs over the prisoner's

head and there is consequent greater tension -- nobody can be certain, but it does seem to be generally agreed that that is the fact, and I think it is a proposition which the Court having to make such a difficult choice as this should bear in mind.

In concluding my remarks I want to say, I am happy to be in a position to say, though it doesn't solve the problem, I think great credit is due to the persons who are responsible for solving this problem. I think Commissioner Ward and Commissioner Coughlin are both working to the limits of their endurance to solve their respective responsibilities.

I am persuaded that the Mayor of New York is doing all that he can to see that funds are provided, and I have no reason to feel any less affirmative about Governor Carey's attitude or that of the respective legislatures of New York City and New York State.

Nevertheless, that still leaves us in the situation we are even with everybody working as hard as they have been working. All the Court can observe, though this is purely dicta, is the Court shares everybody else's views that these matters should not have to be decided by a single judge in our system, and that they have to be decided by the development of policies within the state executive and legislative and city executive and legislative branches ultimately.

There does remain the question of whether the 48-hour period is reasonable or not. We simply have no exploration of that. I don't see we need to do that in this formal setting and I ask counsel if they will meet me in chambers within a few minutes and we will go into that and make a ruling.

(Recess.)

(In Chambers:)

THE COURT. I suppose the logical way for us to proceed is to ask Mr. Rodriguez and his colleagues -- I will put it on an

order to show cause basis, why can't you take people within 48 hours, if you can't? Maybe I am assuming something incorrectly.

Mr. Koerner.

MR. KOERNER: I want to clarify that 48 hours is after we complete the processing and commitment papers so there is already constructed into that order a built-in time span after someone is technically state ready.

THE COURT. Maybe I should ask Mr. Rodriguez is there any problem about the timing? I didn't want to foreclose a discussion, but I didn't want to invite one uselessly.

MR. RODRIGUEZ. Two aspects:

One, the issue Mr. Koerner brings up, statutory law. I am not exactly sure which statute is involved.

MS. SCHALL: There is a criminal procedure section which mandates certain paper work be done before someone is state ready. There was an addition to that section about summary of a person's medical records and other things.

What we are proposing is 48 hours after all that paper work is done, and it takes us some amount of time -- probably now in excess of a week, although hopefully not always in excess of a week -- to get from the time someone is sentenced to the time they are declared state ready and the paper work is done.

THE COURT: So you are talking about aperiod of a week to ten days in actual elapsed time.

MS. SCHALL: Current practice would be that, though I would hope to decrease the time.

I would offer to give the state department notice the day someone was convicted so that, although that wouldn't be the actual beginning of the 48 hours --

THE COURT: You mean sentenced.

MS. SCHALL: Yes. So they would know sometime within the next ten days they would get notice that person was ready for transfer, so it would give them a substantial amount of time.

MR. RODRIGUEZ: That was my first concern.

My second concern is that right now we could probably comply with that order with the Attica space. People have been working around the clock to get that readY. We could fill up all 275 beds. In other words, if you ordered us to take 275 people off the Island in 48 hours, we could do that.

The second part of that is where do we go next. The final decisions have not been made on where we put the beds, in which gymnasium throughout the state. That will only take a few days. Once that happens when we can, I would imagine, pick up people a few days after they are ready for us to pick them up.

THE COURT. My suggestion is this. I can't believe that Commissioner Ward wouldn't cooperate with Commissioner Coughlin in any problems he can't avoid. The city is aware I am not going to entertain an application to hold somebody in contempt on some technicality. We will have a framework here and try on all sides to live by it in good faith.

If those are the only problems that you have I think the proper way for me to proceed is to sign the order with the understanding that these situations are fluid and if there is any radical change of events one way or the other it probably will have to be reconsidered, but we have to have something to go by on a regular basis.

That's what I will do.

What effect would the order signed have in terms of numbers at the time?

MR. KOERNER: We have in excess of 500, your Honor, so to the extent that the state could accommodate us we obviously would be able to reduce our population problem to meet the

conditions that you set forth in your order to take effect August 1st.

To the extent that they cannot accommodate us it will, of course, present us with a problem and we are prepared to make a motion, hopefully orally, or work out something with the Legal Aid Society so we would all be involved in one comprehensive plan.

THE COURT. Are the people at this table sufficiently knowledgeable to be able to work it out or does it rerquire discussion between the commissioners or what?

MS. SCHALL: If you use the population figures of the 27th we had 9500 people-odd and our capacity August 1st will be 9,019, and there were 538 state ready inmates.

THE COURT. I understand in order for you to be literally in compliance with my order, the state would pretty much substantially have to remove all these people.

MS. SCHALL: That's right.

THE COURT. I would like to ask Mr. Rodriguez how quickly he thinks that can be done, if he knows.

MR. RODRIGUEZ: Within a few days we can take 275. As far as the other 275 or so I don't feel sufficiently briefed to be able to tell you that, your Honor.

THE COURT: I think I should sign the order which will order you to take them. I think it should be understood that you will, without question, take 275 forthwith, that whatever problems there are about taking the remainder will be immediately discussed with Commissioner Ward and if they can't be worked out between Commissioners Ward and Coughlin -- and when I say that I mean if they have to speak to each other personally, they should, but if not their deputies or whoever -- if they can't be worked out it will be immediately brought to my attention, and I will have to try to decide what to do, but the policy is to be

a 48-hour pattern after processing, and the order is for the state to take everybody that they can take, unles they can demonstrate any problem.

I thought we had just been through this, and I think my ruling is going to have to be adverse to the state, but if there is any particular proposition that is going to make something difficult for a matter of days or a week or something like that, we will all have to accommodate ourselves.

MR. RODRIGUEZ: I will be able to come before you then.

THE COURT: Yes.

MR. KATZ: I am sure the Court is aware our primary concern is enforcement of the Court's order which requires the dormitory population to be reduced by August 1st. That order arose in response to very serious conditions of overcrowding which the city virtually conceded represent a real threat to safety and security and which was preventing them from providing basic services.

As we heard from Mr. Tufo yesterday, that situation has gotten progressively worse in the last few months and we think it is imperative the order be enforced on August 1st.

That August 1st date was one the city proposed and which the Court accepted although we had urged prompter relief. We thought it important there be relief before the summer. The Court's order anticipates if the city couldn't comply, then one necessary means of compliance might be release of pretrial detainees.

Our understanding of yesterday's proceeding was the city proposed there was a more reasonable alternative, the state assume its obligation of state ready inmates, and we have no disagreement with the Court's decision today that the state has that legal obligation, but I think it should be clear that both systems have a number of options available, whether it is population control by release, or however they handle the population, and feel very strongly plaintiffs' rights in this case should not turn upon the

state's working out a way of getting beyond just 275 spaces at Attica; that whatever other options exist have to be employed by both systems so plaintiffs' rights can be assured.

THE COURT. I take their rights seriously, too, as I am sure you know, but I have to consider not only your clients but the community, and there is no doubt about the fact that release is something that should be contemplated if necessary, but not if not necessary.

My view of the matter is that the state should be held to the requirements of this order, unless there is any reason -- and they will have to demonstrate it to me if there is -- which would put it beyond their power to comply, bearing in mind the fact that they are being asked to take 500 plus inmates in a very short period of time, which is a most unusual thing.

I am instructing Mr. Rodriguez that he should advise me -- it is twenty minutes of 11:00 -- I don't know why you can't advise me by three o'clock this afternoon -- if there are problems that can't be worked out, and I will be prepared to do something about that if it is so.

I hope, Mr. Katz, that we are going to have compliance or almost complete compliance as things will go along, and I am not prepared to say in advance what I will do if they say they can't take 50 people or can't take 25 people or something like that.

My objective is the same as yours. By August 1st, to get this problem cleared up. That leaves us only three days.

MR. RODRIGUEZ: As I have stated, we are prepared to take the 275, so that is covered. As far as the other remaining 275 or so, do we also have to take them?

THE COURT: It is your obligation, yes, and I am waiting to hear what the problems are. I take it from what your mood is, and you conveyed it to us, it will not be as easy for the next 275 as the first 275, but the shoe is on your foot and you will have to let me know what the situation is.

In that regard we normally have meetings, of course, on Fridays. I am keeping that time open still this week, although I am leaveing on vacation thereafter.

Since the situation is as difficult as it is, I want you to know -- although I would certainly not like to have to come from vacation if I don't have to; I would if I have to -- however, I will be back on the 18th and 19th in the middle of my vacation, so I will put aside some time on the 19th, let's say, for whatever problems have accumulated between now and then with the hope that will take care of things.

MR. RODRIGUEZ. Your Honor, may I ask one question of the city. All the 550 or so, are they all ready to --

MS. SCHALL: Yes.

MR. RODRIGUEZ. All the papers are done?

MS. SCHALL: Yes.

THE COURT. They can't wait. They are looking forward to spending their summer in the country.

MR. KOERNER. Do you want to meet with us on Friday?

THE COURT. The regular time, at two o'clock. If we have to. I assume we may have to.

MR. KATZ. I will not be able to be present, though there will be people from my office.

(Adjourned)

* * * *

OPINION OF THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 22, 1986, APPENDIX G

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75 Civ. 3073 (MEL)

JAMES BENJAMIN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, et al.,

Defendants.

LASKER, D.J.

This suit was commenced against New York City officials in 1975 by persons housed while awaiting trial at the House of Detention for Men on Rikers Island (HDM). They complained that the conditions under which they were held were constitutionally impermissible, and in particular that the institution was unconstitutionally overcrowded. In August of 1980, after five years of litigation which included a lengthy trial and substantial post-trial negotiations between the plaintiffs and the City defendants, this court ruled that, in order to meet constitutional standards, the population of HDM be reduced to 1200.[1] *Benjamin v. Malcolm*, 495 F.Supp. 1357 (S.D.N.Y. 1980).

In August, 1980, the City defendants moved to join the Governor of New York and the Commissioner of the Department of Correctional Services of New York State (the State) as defendants. The City argued that the State was obligated under § 430.20 of the New York Criminal Procedure Law to remove "forthwith" from City facilities persons sentenced to imprisonment in State institutions; that the State was failing to meet this obligation and that its failure prevented the City from meeting its obligations under this court's order to limit the population of HDM. That application was denied solely because of the assurances given by the State Commissioner that the State would voluntarily meet its obligations under Criminal Procedure Law § 430.20. *Benjamin v. Malcolm*, 88 F.R.D. 333 (S.D.N.Y. 1980).

Although the problem was thus temporarily solved by voluntary action, the growth of the State prison population in the period between the summer of 1980 and the summer of 1981 resulted in a renewed failure of the State to remove State prisoners from City facilities on a timely basis, so that in July 1981 the City again moved for a judicial order requiring the State to do so. That application was granted and on August 20, 1981 an order was entered requiring the State to accept, within forty-eight hours of the completion of transfer processing, each

person housed at HDM who is sentenced to a term of imprisonment in a State correctional facility.

The State inmate population has continued to grow since that date and now, less than four months after the entry of the order, the State moves under Rule 60(b)(6) of the Federal Rules of Civil Procedure to modify the August 1981 judgment so as to permit the State to accept only those State-ready inmates which it has spaces for within the State correctional system. The State emphasizes that its request for modification is temporary only because it is in the process of constructing additional capacity which, it alleges, will by March 1, 1982 make available 1,317 new beds. It estimates that the maximum "backup" population of State-ready inmates which it would fail to remove from HDM in the intervening period would be 303, and the minimum 20. (Affidavit of Thomas E. Coughlin, III, Commissioner of the Department of Correctional Services of the State of New York in Support of the motion.)

I.

The State argues that the relief it seeks is justified because it has "taken every possible initiative to create cell space in existing facilities", has utilized recreation areas, basements and substandard galleries, and rejected the Department's long standing policy of refusing to "double-encumber" all space -- that is, has even utilized cells of inmates who are in the hospital or out to court. The State claims that as a result of the present overcrowding in its prisons it has discontinued rehabilitation and program efforts, and that the present population of 25,490 prisoners amounts to 112.1% of its system's capacity. It contends that further population growth will cause "unacceptable risks to the safety and security of the employees, the inmates and the institution", including the housing of inmates in the cell-block corridors of maximum security prisons and the use of current program space for inmate housing in such institutions.

The City vigorously opposes the State's request for relief. Its arguments are set forth in the affidavit of Benjamin Ward, Commissioner of the New York City Department of Correction

who, immediately before coming to his present position in August 1979 was, for over three years, the Commissioner of the Department of Correctional Services of the State of New York and who, accordingly, has intimate knowledge of the operations of both systems. According to the City, the State is not entitled to relief because it has failed to provide a solution for the problem it faces today although the problem was entirely forseeable. For example, the City points out that in 1978, Ward, then State Commissioner, drew up a construction plan which would have resulted in the provision of 3,000 beds, but that the State failed to implement it; and that the present State correctional administration, in its 1980 Master Plan, called for consideration of expanded use of "good time", increased use of alternatives to imprisonment and earlier parole, to reduce prison population, but that none of these proposals has been acted on.[2]

The City points out that it has reduced its own overcrowding not only by adding 900 beds to its capacity in the last year, but also by conducting monthly bail reviews, funding additional community services programs as alternatives to incarceration and decreasing inmates' lengths of stay by expediting the preparation of probation reports. It suggests that similarly creative approaches should be used by the State and that their absence renders it against the interests of justice to grant the State's application. It concludes that "Surely overcrowding City jails with convicted felons is the least desirable of the solutions to the State defendants' problem."

Moreover, the City claims that since the State releases approximately 173 inmates per week from its prisons and takes only an average of 160 from the City it is attempting, by this motion, merely to accommodate the other counties in the State from which it draws the remainder of its population.

The City points out that litigation is pending in the Supreme Court of the State of New York, Albany County, in which a class of New York State inmates contends that under § 70.30(a) of the New York Penal Law there are approximately 2,000 inmates who have not received credit for their jail time before

sentencing; that these inmates will be released earlier if their claims are correct; that all of these inmates come from outside of the City of New York, and that the State should be required to recalculate their jail time credit before the court acts upon the present motion.

The City casts doubts upon the State's assertion that its present population amounts to 112.1% of the capacity of its system. It stresses that the State has not indicated the square footage per inmate upon which that figure has been calculated, or whether capacity has been adjusted to account for the current use of general confinement beds vacated by inmates in special housing, for example.

The plaintiffs take no position as to the relative responsibilities of the City and State for State-ready inmates but express their concern that compliance with the Court's orders eliminating overcrowding in the City's jails be assured. In this connection the plaintiffs argue that the State has not established any facts which would justify a modification of the order of August 20, 1981. The plaintiffs criticize the State for considering the only solution to the problem to be the creation of further cell space without making any efforts to manage prison population by other means.[3]

II.

Rule 60(b)(6) reads:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representatives from a final judgment, order or proceeding for (6) any . . . reasons justifying relief from the operation of the judgment."

The rule implies, by stating that relief shall be granted "upon such terms as are just" that a significant change of circumstance shall have occurred since the date of the final judgment to warrant its modification, and the courts have acted accordingly.

The pattern for the disposition of a motion for such relief was drawn in *United States v. Swift & Co.*, 286 U.S. 106 (1932). In *Swift*, Mr. Justice Cardozo, speaking for the court, stated:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes to the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of a grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

United States v. Swift, supra, 286 U.S. at 119.

Although *Swift* antedates the enactment of the Federal Rules of Civil Procedure, its pronouncement has been regularly followed in decisions relating to Rule 60(b)(6) and has become part of the canon of the Rule.

We agree with the City and the plaintiffs that the State has failed to make a showing that circumstances have so changed in four months as to warrant a modification of the judgment of August 20, 1981. Moreover, the only circumstance which has changed -- an increase in the population of the State's prison population -- was entirely foreseeable in August, 1981, and had been for a long period before that date.

Certainly the State has not demonstrated that, as required by *Swift*, the dangers (at HDM) "once substantial, have been attenuated to a shadow" (indeed they remain as acute today as they did four months ago); or that the State movants are suffering hardship so extreme *and unexpected* as to be regarded as victims of oppression, nor has it made "nothing less than a clear showing of grievous wrong evoked by new *and unforseen conditions*" (emphasis added).

The State's obligations were not established in the first instance, however, by the judgment of August 20, 1981; but rather by New York Criminal Procedure Law § 430.20, and neither modifying nor vacating the judgment would operate to absolve the State from its statutory duty. The State's application amounts to a request that this federal court suspend the operation of the State's own statute as to what the working relationship between the State and City Correctional Systems should be. It is ironic that where the federal court's order to a State agency is to obey the statute enacted by its own legislature, the agency asks the federal court to relieve it of that obligation. Such a request should be addressed to the State legislature.[4]

III.

The preceding discussion establishes that there is no legal justification for granting the State's motion. The subject at hand however involves much more than mere legality. No one who has dealt with the chronic difficulty of prison or jail overcrowding can fail to be sensitive to its human implications, and to the pain which it imposes on inmates, and correctional personnel alike. Moreover, it is important to remember that the State inmates and correctional personnel are just as human, and suffer just as much when impermissible overcrowding occurs as do City inmates and personnel. Yet an examination of all the factual aspects of such a difficult case as this nevertheless compels the conclusion that the motion must be denied.

In the bench opinion of July 29, 1981, which supported the judgment of august 20, 1981, six factors beyond the legal obligations of the parties were enumerated as criteria for decision. These were:

"The question of public safety;

The relative impact of the Court's decision on the respective systems;

The relative efforts of the systems themselves to discharge their duties and to solve the problems;

The relative physical space available to the systems, both in terms of beds and in terms of acreage;

The existence of programs or their future availability;

The difference between conditions which exist in detention centers in general and prisons in general."

As to public safety: the same conclusions are to be drawn now as in August, 1981: overcrowding is a serious threat to the security of both State and City institutions. However, State institutions are remote from population centers and its maximum security institutions are walled and protectable. City institutions are massed together in the center of population of New York City and without such physical features as walls.

As to the relative impact of the court's decision on the respective systems: it remains an inescapable fact that the State correctional system is nearly three times as large as the City's and that the relative impact on the State of additions to its population of 200 -300 people will therefore be proportionately less. Moreover, the impact can be diffused among many more institutions than would be true in the City system.

As to the relative efforts of the systems: while the State has worked hard to add bed space, the City has done the same and has, in addition, introduced population control programs, while the State has not.

As to relative physical space: both systems are overcrowded: the State claiming to be at 112% of capacity and the City at 106%. The difference is marginal and, as explained above, the

excess can be handled in the State's larger system with less impact than in the City's smaller. Moreover, the State, as it plans indicate, has plenty of land on which to build additional facilities. The City does not.

At argument counsel for the State contended that the City presently had extra bed space which could house any State-readies which the State would propose to leave at HDM until the State's facilities were completed in March, 1982. However, the record does not support the State's contention. The only vacant cells which exist at HDM are those which had to be vacated in order to render conditions at HDM constitutionally permissible. Indeed, earlier in the history of HDM the New York State Commission of Correction, which has responsibility for overseeing all correctional facilities, both State and local throughout New York, ordered the City (in September, 1977) to reduce the HDM population to 1,200, (its present level). In doing so, it observed in a covering letter of that date that:

> "A population in excess of 1200 prisoners at HDM militates against proper sanitation and cleanliness at HDM and poses a threat to the safety, security and well being of persons employed at or incarcerated in HDM."

Benjamin v. Malcolm, supra, 495 F.Supp. at 1360-61.

Moreover, if vacated space were to be made available to State-readies, service facilities for food, sanitation, programs, guards, etc. could be strained beyond the limits of the currently fragile balance.

As to the existence of programs or their future availability: it is regrettable that State programs have been curtailed during the period of present overcrowding. Nevertheless, it remains considerably easier to establish and maintain programmatic efforts in a prison setting than in jails.

As to the difference between conditions in detention centers in general and prisons in general: it remains true that a prison

population is generally more stable and manageable than the population of a jail.

IV.

Denial of the State's motion is not to be taken as failure to appreciate its problems or to understand the difficulties which will be imposed, though fortunately for a temporary period only, upon its inmates and correctional personnel. However, in the last analysis what the State proposes here is to equalize unconstitutionality by requiring the City to share the burden of impermissible over-crowding with the State. The remedy does not lie in equalizing unconstitutionality but in eliminating it.

The State's motion to modify the judgment of August 20, 1981 is denied.

It is so ordered.

Dated: New York, New York
December 22, 1981

MORRIS E. LASKER

U.S.D.J.

FOOTNOTES

1. The decision also required that population of the cell blocks be reduced so that each cell block be limited to its proportionate share of 1,200 persons.

2. It should be noted that only some of these methods of populatic . reduction are within the control of the Department of Correctional Services. For example, alternatives to incarceration depend largely on the action of the courts, and earlier parole on the policies of the Parole Board. However decisions as to "good time" and as to work-release programs are made by the Correction Department.

3. Peter Tufo, Chairman of the Board of Correction of the City of New York, which is legally charged with setting minimum standards for the City jails and overseeing their population, has also written to the court in opposition to the motion. His letter follows:

"December 15, 1981

BY HAND

Hon. Morris E. Lasker
United States District Judge for
the Southern District of New York
United States Courthouse
Foley Square
New York, NY 10007

Re: *Benjamin v. Malcolm*
75 Civ. 3073 (MEL)

Your Honor:

I would like to state my opposition to the State defendants' motion, returnable on December 16, 1981, to modify the Court's Order of August 20th.

FOOTNOTES 2

The State has put forward no facts which justify a modification of the Court's order. The factors which your Honor considered at the time of the initial decision still compell the State to fulfill its legal obligation. The City system remains seriously overcrowded, and a modification of the Court's order certainly would add to the City's space burden.

As I testified before the Court on July 28, 1981, it is the State which properly should make room for its inmates, and by managing its population this can be done without creating unconstitutional conditions in its prisons.

Respectfully yours,

/s/ Peter Tufo

Peter Tufo
Chairman

PT:ef
cc: Leonard Koerner, Esq.
Ellen Schall, Esq.
Alan Adolph, Esq.
Theodore Katz, Esq."

4. Of course no change of State law would be constitutional to the extent that it resulted in impermissible overcrowding in either City or State institutions.

OPINION OF THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF NEW YORK, TRANSCRIPT DATED OCTOBER 5, 1983, APPENDIX H

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75 Civ. 3073 (MEL)

JAMES BENJAMIN, et al.,

Plaintiffs,

— v. —

BENJAMIN J. MALCOLM, et al.,

Defendants.

October 5, 1983
3:00 p.m.

Before:

HON. MORRIS E. LASKER

District Judge

THE COURT: An application has been made by the city to request the Court to require the state to accept certain classes of detainees or prisoners, as the case may be, to be housed by the state rather than by the city. The motion is prompted by the fact that this Court has previously issued an order or judgment requiring that the city not house more than a certain number of people at the House of Detention for Men and the Anna M. Cross facility. The city has informed the Court that it cannot effectively implement the Court's order unless the relief which it requests it granted.

With regard to the population at HDM and AMKC, and indeed, the general population in custody under the supervision of the city, there does not seem to be any factual dispute.

Because of the urgency of the matter I am dictating a decision from the bench rather than preparing a written decision.

I regard the application by the city as a motion to amend an earlier judgment that was made against the state when analogous relief was requested. I refer to the decision at 528 F.Supp. 925, which was decided in 1981 by this Court.

It is true that the motion has not been so designated, but I agree with the state that there will be no other independent basis for the matter to come before the Court.

The state argues that the relief requested should not be granted because there has not been a sufficient change of circumstances to justify an amendment of the judgment in accordance with the standards set forth in United States v. Swift, 286 U.S. 106, decided in 1932.

Prior to the decision of the Court of Appeals in this Circuit in New York Association for Retarded Children v. Carey, to be found at 706 F.2d 956 and decided this year, the state's argument would have carried considerably more weight. However, in that decision Judge Friendly distinguished the question of amending decrees in so-called institutional reform cases from classic types of cases and dealt at length with the proposition

whether the criteria specified in U.S. v. Swift prevented the amendment of a decree before the Court there. Judge Friendly wrote in part, and I am quoting the words that I think are relevant to, our present situation:

"The institutional reform litigation judicially imposed remedies must be open to adaptation when unforeseen obstacles present themselves; to improvement when a better understanding of the problem emerges, and to accommodation of a wider constellation of interests than is represented in the adversarial setting of the courtroom."

In commenting on the significance of the decision in New York Association for Retarded Children Inc., I stated in Benjamin v. Malcolm at 524 F.Supp. 668 that "The critical question on a motion to modify a decree is whether the proposed modification is 'in derogation of the primary objective of the decree.' " That phrase has been used in Willowbrook.

Here the request for relief by the city is of course not in derogation of the primary objective of my original decree, and accordingly it is at least appropriate to consider the motion.

The question remains whether the circumstances are such as to justify relief. I believe that the circumstances are such as to justify a limited form of relief, which I will indicate in a moment.

First let me say that if the situation were one in which the statistics could demonstrably establish whether the New York City prison population had peaked or whether it was necessary to build new facilities, I might consider it inappropriate to grant this relief because then we would be dealing with a fixed situation which might justify requiring the city to go ahead and build facilities immediately. Since that is not the case, however, at least at the moment, it is appropriate for the time being to invoke the Court's authority to order some use of alternative facilities.

Second, it appears that section 504, I think subparagraph 2, of the corrections law authorizes the state to assist in the solution of the present difficult problem, and that it would not

impose an unreasonable burden upon the state to ask it to take custody of the so-called out-of-court prisoners, that is, state prisoners who are being brought to appear in state courts and who will be returned to state prisons, all purposes that have nothing do with the city or the concepts of detention for which the city's facilities are generally intended.

You will note that I have referred only to the out-of-court prisoners and have stated the reasons why I think it is appropriate for the state to assist the city in handling them. I do not find that the city has made the same kind of showing with regard to the other classes of prisoners for whom they have sought assistance from the state, namely, as I recall, the A and B felony prisoners, the C, D and E felony prisoners, and the parole revocation prisoners. I make no final findings with regard to the merits of the city's position in that regard, except to say that the showings are distinctly between the out-of-court prisoners and the other classes.

To go on with reasons why I believe the relief is justified, the state appears to have space at the Long Island Correctional Facility and that facility appears to be relatively secure. I do understand, of course, the state's reluctance to make the space available because of the community opposition to its use, but I conclude that it is reasonable and necessary to amend the judgment to require the state to accept the out-of-court inmates, and of course the responsibility for that order is mine.

One further comment, as to a reason which seems to me to be consistent with my conclusion, is that in August of 1982, the state judiciary, at least to some extent, recognized the appropriateness of providing that out-of-court prisoners should be held in the custody of the state. I refer to Judge Williams' order of August 1982 which requested the cooperation of state judges to carry out that policy.

I would like to review with you also the factors which in the earlier decision as to the state I considered, because I have considered them again in deciding whether relief is appropriate here. At page 929 of 528 F.Supp., I outlined them as being the question

of public safety. As to that I would comment that I believe that with regard to the number we are talking about, the type of witnesses we are talking about and the facility we are talking about, the prisoners ought to be as secure at the Long Island correctional facility as at the places at which the city would house them.

The second factor was the relative impact of the Court's decision on the respective systems. By that I meant in the previous decision, and still mean, that the size of the respective systems is relevant and the extent to which they can accommodate people. However, I wish to make a comment at this time to say that I recognize that the state's problem has since the time of the earlier decision become very much more serious than it was at that time, and it was serious even in 1981, and I recognize and wish to advise the city that I do not think that the city can expect indefinitely that if the population problem becomes more aggravated it can automatically come to this Court for relief as to the state, because the Court will certainly take into consideration the problems that the state has, along with those that the city has.

Going on with these factors -- perhaps I have already commented on some of them -- one is the relative efforts of the systems themselves to discharge their duties and to solve the problems. Again I want to comment that it seems to me, both from judicial notice but from the material that has been put before me on this motion and perhaps other items, that the state's relative efforts have been as great as the city's, although I recognize that the city has made substantial efforts to discharge the duties and solve the problems before it.

The next factor was the relative physical space available to the systems, both in terms of beds and in terms of acreage. Of course, there is no doubt that the state has greater acreage and there is no doubt that the state has greater beds, but the state itself is faced with dire problems at the moment, and the placement of a 10,000 person system with a 30,000 person system is beginning to become less obvious than it was two years ago.

I think the other factors are not necessarily terribly significant. They consist of future programs in terms of availability -- that is certainly not a problem in terms of out-of-state prisoners -- and the last factor was the condition which exists in detention centers in general and prisons in general. While I continue to believe that an important factor, like some of these other propositions, the importance begins to dim as the problems of both systems get more and more acute.

I have covered the points I wish to make in indicating my decision, and I will be glad to receive an order. I would like to continue the meeting with the plaintiffs and the city defendants to discuss the question of the restoration of the cap and the circumstances for the release of detainees if that has to arise. If anybody else wishes to stay, they are welcome to do so but business will be only between myself and the original parties to the suit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, APPENDIX I.

UNITED STATES CONSTITUTION

Article III

§ 2. Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between citizens of different States, — between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

AMENDMENT [XI.]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of

their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. §1331. **Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

New York State Criminal Procedure Law

§ 430.20 **Commitment of defendant**

1. **In general.** When a sentence of imprisonment is pronounced, or when th[1] sentence consists of a fine and the court has directed that the defendant be imprisoned until it is satisfied, the defendant must forthwith be committed to the custody of the appropriate public servant and detained until the sentence is complied with.

2. **Indeterminate and reformatory sentences.** In the case of an indeterminate or reformatory sentence of imprisonment, commitment must be to the custody of the state department of correctional services as provided in subdivision one of section 70.20 and section 75.05[2] of the penal law. The order of commitment must direct that the defendant be delivered to an institution designated by the commissioner of correctional services in accordance with the provisions of the correction law.

3. **Definite and intermittent sentences.** In the case of a definite or intermittent sentence of imprisonment, commitment must be as follows:

> (a) In counties contained within New York City or in any county that has a county department of correction, commitment must be to the custody of the department of correction of such city or county;

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[1] So in original. Probably should read "the".

[2] Repealed by L.1974, c. 652, § 7, as amended by L.1974, c. 653, § 7, eff. July 31, 1974.

(b) In any other case, commitment must be to the county jail, workhouse or penitentiary, or to a penitentiary outside the county and the order of commitment must specify the institution to which the defendant is to be delivered.

§ 430.30 Duty to deliver defendant

In counties contained within New York City and in counties that have a commissioner of correction who is responsible for detention of defendants in criminal actions, it is the duty of the commissioner of correction of such city or county to deliver the defendant forthwith to the proper institution in accordance with the commitment. In all other counties it is the duty of the sheriff to deliver the defendant forthwith to the proper institution in accordance with the commitment.

L. 1970, c. 996, § 1.

New York State Correction Law

§ 601. Delivery of commitment with inmate; payment of fees for transportation

Whenever an inmate shall be delivered to the superintendent of a state correctional facility pursuant to an indeterminate sentence, the officer so delivering such inmate shall deliver to such superintendent, a certified copy of the sentence received by such officer from the clerk of the court by which such inmate shall have been sentenced, a copy of the report of the probation officer's investigation and report or a detailed statement covering the facts relative to the crime and previous history certified by the district attorney, a copy of the inmate's fingerprint records, a detailed summary of available medical records, psychiatric records and reports relating to assaults, or other violent acts, attempts at suicide or escape by the inmate while in the custody of the local correctional facility; any such medical or psychiatric records in the possession of a health care provider other than the local correctional facility shall be summarized in detail and forwarded by such health care provider to the

medical director of the appropriate state correctional facility upon request; the superintendent shall present to such officer a certificate of the delivery of such inmate, and the fees of such officer for transporting such inmate shall be paid from the treasury upon the audit and warrant of the comptroller. Whenever an inmate of the state is delivered to a local facility, the superintendent shall forward summaries of such records to the local facility with the inmate.

(b) Whenever an inmate is sentenced by a court of this state to an indeterminate sentence, but the inmate is immediately returned to a correctional facility under the jurisdiction of the United States or of a sister state, the clerk of the court shall immediately sent to the commissioner of the department a certified copy of the sentence, a copy of the probation report and a copy of the fingerprint records of the inmate.

AFFIDAVIT OF THOMAS A. COUGHLIN III,
SWORN TO MARCH 5, 1986, APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES BENJAMIN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al., 75 Civ. 3073 (M.E.L.)

Defendants.

ERNESTO MALDONADO, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al., 76 Civ. 2854 (M.E.L.)

Defendants.

DETAINEES OF THE BROOKLYN HOUSE OF DETENTION FOR MEN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al., 79 Civ. 4913 (M.E.L.)

Defendants.

DETAINEES OF THE QUEENS HOUSE OF DETENTION FOR MEN, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al.,

Defendants.

79 Civ. 4914 (M.E.L.)

IOLA FORTS, et al.,

Plaintiffs,

– against –

BENJAMIN J. MALCOLM, Commissioner of Corrections of the City of New York, et al.,

Defendants.

76 Civ. 101 (M.E.L.)

STATE OF NEW YORK)
) SS.:
COUNTY OF NEW YORK)

THOMAS A. COUGHLIN III, being duly sworn, deposes and swears that:

1. I am the Commissioner of the New York State Department of Correctional Services ("DOCS"). As such, I am the chief executive officer of the Department and have been so since my appointment in August of 1979.

2. I make this affidavit in opposition to the defendants' motion to join me as a party to the above-entitled five actions and in support of my application to vacate the mandatory injunction requiring me "to accept custody of each person housed in correctional facilities of the City of New York who is sentenced to a term of imprisonment in a State facility within forty-eight

hours after the necessary papers for transfer have been completed". That injunction is set forth in this Court's Order to Show Cause signed February 24, 1986.

3. I am informed that the above-entitled five actions were commenced by inmates challenging the conditions of confinement at the House of Detention for Men on Rikers Island ("HDM"), the Adolescent Reception and Detention Center ("ARDC), the Brooklyn and Queens Houses of Detention ("BHD" and "QHD") and the Correctional Institute for Women ("CIFR").

4. I have read the papers submitted by defendants in support of their motion. With respect to the defendants' motion to join me as a party, I am informed by counsel that defendants have failed to come forward with any jurisdictional predicate which would allow this court to determine this motion.

5. While defendants' papers are replete with assertions that Governor Cuomo and I must be joined as parties if defendants are to comply with consent decrees entered in the five actions, consent decrees to which I was not a party and did not agree, there is a total lack of any factual allegations to support these assertions. Nor are there any factual allegations which would support a conclusion that the conditions of confinement in the five facilities are currently unconstitutional or in immediate danger of becoming unconstitutional. I submit that, given this failure, were this Court to have jurisdiction to determine defendants' motion, it should be denied.

6. With respect to the mandatory injunction set forth in this Court's Order to Show Cause, I am informed by counsel that this injunction against me, on its face, is to continue pending this Court's determination of defendants' motion. While that determination could take place on March 7, 1986, it is entirely possible that the Court will not decide the motion on that date, in which case the injunction could extend well beyond 10 days, despite the requirements of Rule 65, Fed. R. Civ. P.

7. In addition, the injunction is not limited to state ready inmates at the House of Detention for Men on Rikers Island, as

was this Court's order of August 20, 1981, the only prior order in these actions which concerned me. Instead, the injunction applies to all sentenced inmates, which includes women and adolescents, and the categories of parole violators and out-to-court inmates. Also, by reason of the facts set forth in paragraphs four and five above, I submit that the defendants have failed to show that they have met the established standards for granting a preliminary injunction.

8. In addition, I am informed by counsel that, while defendants have not specifically asked that any relief be granted against me in the event they are successful on their motion, I can assume that defendants will seek to continue the injunction contained in the February 24, 1986 Order to Show Cause. In this connection, I am informed by counsel that were this Court to have subject matter jurisdiction to determine defendants' motion, defendants would not be entitled to injunctive relief both by reason of the facts set forth in paragraphs four and five above and because, as set forth below, I have fulfilled my state law obligation to accept inmates from local facilities throughout New York State in a reasonably timely manner.

9. I submit this affidavit to describe 1) the DOCS system for accepting custody of new inmates, which has included giving New York City a preference, 2) the situation in counties outside of New York City, and 3) the current status of the DOCS system. In addition, defendants have referred to parole violators and inmates who are transferred from DOCS facilities to the New York City Department of Corrections ("NYCDOC") facilities because their attendance is required as a defendant or a witness in State court proceedings in New York City ("out-to-court inmates"). I submit this affidavit to provide background information concerning these inmates.

DOCS System for Accepting New Inmates

10. New inmates come into DOCS's system as new court committments or as parole violators. New court committments are referred to as state ready inmates. A state ready inmate is one who has been sentenced to a state institution, whose court

committment papers have been completed, whose fingerprints have been recorded, whose fingerprint cards have been filled out, whose presentence report has been completed, whose medical history, psychiatric reports, disciplinary record, history of assaults, riots, etc., has been collected and put together in a packet and whose local facility is capable of delivering the inmate to a state reception center.

11. Parole violators are persons finally adjudicated to be parole or conditional release violators. New York law provides for both parole release and conditional release under parole supervision for prisoners convicted of felonies and sentenced to indeterminate terms. Such prisoners are housed in DOCS facilities. Both parole release and conditional release are subject to revocation for cause and upon notice and a hearing, as required by *Morrissey v. Brewer*, 408 U.S. 471 (1972), and as provided by New York Executive Law § 259-i (3). Upon revocation, parole violators are returned to DOCS facilities.

12. New inmates are received into the system at reception centers at several locations. Reception centers are designated pursuant to Correction Law § 137 and, because reception inmates have yet to be classified, each reception center must be a maximum security facility. All females go to Bedford Hills Correctional Facility (30 beds for reception inmates). Males under 21 years of age are received at Elmira Correctional Facility (413 beds for reception inmates). The remaining male inmates 21 years or older are received as follows: the western counties of the state go to Wende Correctional Facility (150 beds for reception inmates); northern counties go to Clinton Correctional Facility (5 beds for reception inmates); all other counties go to Downstate Correction Facility (844 beds for reception inmates).

13. Each inmate who is received into the system must go through an initial processing. This includes a medical screening, a programatic assessment and a security classification. In order to determine an inmate's security classification, facility staff must review the inmate's sentence, the nature of his crime, any past criminal or institutional history, and any other available

information about the inmate. The initial processing takes place at classification facilities which are Bedford Hills, Elmira, Wende and Downstate. It takes at least 10 working days to complete the initial processing.

14. In determining how many new inmates DOCS can take from a particular locality, the amount of space available in local facilities is taken into account. For example, one county may have 10 new inmates but only one available bed while, at the same time, another county may have 50 new inmates and 50 vacant beds. The county with the 10 new inmates is considered before the county with the 50 new inmates. DOCS also makes exceptions for circumstances such as where a woman is going to have a baby and the locality does not have a nursery, or someone needs serious surgery and the locality is not equipped to provide it.

15. Inmates are transferred from classification beds to other beds as beds become available in the system, which in turn makes beds available at the classification centers for new inmates.

16. New inmates are accepted into the system as beds are available and on an equitable basis from the different counties except that New York City receives a preference. First, New York City indicates, on a day to day basis via New York State Police Information Network, the number of state ready inmates who are in their system. Since 1981, when this Court entered its order that I should accept state-ready inmates from HDM, these inmates were taken first and whatever space was left was distributed among the other counties. At times, including recent months, starting in about October, 1985, the pressure of the number of new inmates in counties outside New York City has been such that it has been necessary to take new inmates from other counties before accepting all state ready inmates in New York City. Inmates are accepted from New York City on a daily basis during the work week. Inmates from counties outside the City of New York are accepted as space is available at the end of the week after taking New York City inmates. Attached hereto as Exhibit "A" are copies of DOCS Division of Classification and Movement's ("C&M") Weekly Status Reports for 1985

and January and February 1986 which set forth the number of inmates received from localities and length of time the inmates had been in local facilities.

17. C&M plans for the reception of new inmates one week in advance. Every Wednesday, C&M surveys the system, 72 separate units, and finds out who is leaving each unit in the next week. This includes inmates who are leaving permanently because of receiving parole and conditional release, or having served their maximum sentence. Each week, every bed so identified is filled. In addition, C&M, based on past experience, projects that a certain number of additional beds will be vacated due to parole or conditional release dates which have not yet been scheduled. For example, on a Wednesday in December C&M is told that there are 100 releases scheduled for the next 10 days; in past years, an average of 250 inmates were released each week during that time of the year; C&M, then, will allow for an additional 150 beds to be vacated. C&M also includes a count of inmates who are temporarily moving into disciplinary segregation, to the facility or outside hospital, or out-to-court. DOCS's aim is to fill as many of the temporarily vacated beds as possible. This is known as double encumbering. However, a certain number remain vacant because it is logistically impossible to fill them all. For example, if an inmate is sent to the hospital on an emergency, an order to produce an inmate is served, or an inmate is released on bail, C&M may not find out about it for a few days. Also, the logistics of transporting inmates interfacility is such, *i.e.*, vans and buses do not go to each facility each day and trips are scheduled on short notice to inmates and without identifiable scheduling pattern for security/escape reasons, that beds sometimes remain vacant while inmates are being transported. DOCS is, therefore, only able to fill between 50 and 70 percent of these beds.

18. I submit that, by reason of the facts set forth in paragraph 17 above, it is the actual number of beds available in the DOCS system, and not DOCS manipulation of the state ready population for purposes of court appearances in this litigation, as asserted by defendants, which determines the number of state ready inmates which DOCS accepts into its system.

19. In this connection, I would also state that I am informed by my staff that defendants do not accurately report the state ready figures and inaccurately characterized the unpredictability of the numbers of state ready inmates in NYCDOC. Specifically, I am informed that:

a. Defendants, while defining state readies as those inmates who have been processed, designate inmates as state ready as soon as they have been sentenced. As a result, there is a constant number of inmates who will show up as being state ready who, in fact, are not. For example, if in a week 50 inmates a day are sentenced by the end of the week there are 250 inmates NYCDOC is classifying as state ready and at the end of two weeks there are 500. While I do not know how long NYCDOC currently takes to process inmates, previously in this litigation defendants stated that it took between ten days to two weeks. If this is still the case, NYCDOC is classifying between 250 and 500 inmates as state ready who are not.

For a further example, on February 21, 1986, New York City figures totaled 33 adult males and juveniles, all of which were alleged to be 14 days or less state ready. Based on calendar year 1985 figures, New York City sentenced approximately 32 inmates per day. If, indeed, New York City cannot get these inmates ready for at least 10 days, then, of the 330 state ready males and juveniles noted above, 256 of that number are not in actuality state ready because they have not aged 10 days since sentencing. This is computed by using 10 calendar days rather than 10 working days. Therefore, the actual number of state readies in this example was 74, not 330, and none of these were more than four days state ready.

b. Frequently the state ready population in NYCDOC is increased, not by reason of DOCS refusal to accept inmates, but, by NYCDOC's decision that, for their own logistical reasons, they will not transport inmates on a given day or days.

c. Defendants have made repeated references to the fluctuations in the state ready population in NYCDOC facilities, and

asserted that these fluctuations were a result of my failure to accept custody of state ready inmates. In fact, there are traditional seasonal trends in state ready populations. In August and September, these populations are at a low; they then increase until the Thanksgiving and Christmas season when more paroles are granted; they then increase again until about March when they level off until August. In addition, information about the numbers of arrests, indictments, court backlogs, etc. is compiled and available from the Office of Court Administration and the Division of Criminal Justice Services which enables correctional systems to make some predictions about its future population.

20. It should be noted that there is also movement of inmates throughout the system which complicates the C&M process. Inmates move from maximum security facilities to medium security facilities to minimum security facilities. In addition, approximately sixty percent of the inmates are from the New York City metropolitan area. These inmates move from upstate facilities to facilities closer to New York City in an effort to get them closer to home as their security level is reduced and their release date nears.

Counties Outside New York City

21. My responsibility to accept new inmates is a state wide responsibility. In recent years overcrowding in a number of local facilities outside the City of New York has become chronic. Currently, there are three counties involved in litigation in federal court concerning the conditions of confinement in their facilities. These counties are Nassau, *Badgley v. Verelas*, E.D.N.Y., CV 80-2916 (J.M.), Onondaga, *Albro v. County of Onondaga*, N.D.N.Y. 85-CV-1425 (H.G.M.) and Suffolk, *Phillips v. Finnerty*, E.D.N.Y., CV 82-3385 (F.X.A.). In each of these cases, overcrowding has been alleged to have contributed to worsening conditions. Copies of the complaints in each of these cases are attached hereto as Exhibits "B", "C", and "D" respectively.

22. In addition to ongoing litigation, C&M staff receive frequent complaints from other counties that their facilities are

overcrowded. These counties include Albany, Broome, Monroe, Putnam, Rockland and Westchester.

23. In the past, DOCS has given preference to New York City in accepting new inmates. However, given the facts set forth in paragraphs 20 and 21 above, I submit that continuing such a preference to the detriment of other localities raises serious questions under both state and federal law.

DOCS System

24. As well as having a responsibility to accept new inmates from localities throughout the State, I have a responsibility to operate the DOCS system in a constitutional manner. Requiring me to accept inmates from New York City within an arbitrary time period severely impairs my ability to meet this responsibility. Indeed, while I was under this Court's mandate, the Second Circuit found that there were serious questions raised concerning the consequences of overcrowding in the DOCS system. *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984). In addition, inmates from Fishkill Correctional Facility have recently brought the first case in federal court which raises claims that the conditions of confinement in a DOCS facility are unconstitutional because of the pressures of overcrowding. *Alston v. Coughlin*, S.D.N.Y., 85 Civ. 5237 (L.L.S.).

25. DOCS' capacity to house inmates is determined by the ability to provide each inmate with a cell or, in the case of dormitory housing, with an adequate number of square feet for living quarters. Additionally, capacity is determined by the ability of the system's infrastructure, such as laundries, dining halls, gymnasiums, medical facilities and so forth, to provide appropriate support services.

26. On December 30, 1981, I submitted an affidavit to this Court stating that the in-house population of DOCS was 25,353, whereas the total "housing capacity" and temporary capacity was 25,039. Less than two years later, in September, 1983, I submitted an affidavit stating that, as of that date, the population was 30,582 while the "housing capacity" was 25,389 and

temporary capacity was 3,227. Since that time, while DOCS has continued to add housing capacity, the population has continued to rise. As of March 4, 1986, the in-house population was 35,424 and the "occupancy capacity", which includes 30,231 "housing capacity" as well as 2,957 miscellaneous beds, *i.e.*, temporary release, reception, is 33,138. There is also 1385 restricted capacity and 1,859 temporary capacity.

27. The term "housing capacity" is defined as general confinement cells or other general confinement living space designed for human occupancy which meets appropriate building codes and appropriate programmatic opportunities. There are also categories of "restricted capacity" housing which must be maintained to serve particularized housing needs such as disciplinary, administrative or protective segregation, or infirmary and other health care areas, including AIDS wards. The emergency, temporary housing space which DOCS continues to resort to in an effort to ease the pressures put on the system consists of converted hallways, recreation areas and space previously devoted to inmate education and training. Use of such housing strains facility infrastructure and services such as showers, toilets, food service *etc.*

28. To deal with this problem, DOCS has taken a number of steps. Among them, of course, is the acquisition of additional facilities. Even though 9,400 new beds have been provided by various expansion methods since January 1, 1981, there are still more inmates than DOCS' permanent capacity can house. DOCS' current expansion plans include the addition of 1340 beds in fiscal year 1985 - 1986, 3028 in 1986 - 1987, and 1100 in 1987 - 1988.

29. In addition, DOCS continues to "double encumber" several hundred beds by moving inmates into beds vacated by other inmates who have been temporarily moved into disciplinary segregation, to the hospital, or out to court.

30. Meanwhile, as set forth in my September 28, 1983 affidavit, DOCS' inmate population continues to be increased by well known factors such as enactment of stronger mandatory sentence laws, recent increases in state-wide felony indictments,

creation of additional criminal trial judgeships, and increases in the New York City criminal disposition rates. The result has been that in 1985 there were about 200 more court commitments than there were in 1984.

Parole Violators

31. New York law provides for temporary detention of persons accused as, but not yet finally adjudicated to be, parole or conditional release violators – such individuals are referred to herein as "alleged parole violators". It also provides for reincarceration, among other options, of persons finally adjudicated to be parole or conditional release violators – referred to herein as "parole violators."

32. Historically, counties and cities, not DOCS, were responsible for detention of alleged parole violators, and NYCDOC accepted and performed that responsibility until April, 1980. At that time, a New York City transit strike impaired NYCDOC's ability to take custody of alleged parole violators, and NYCDOC's then Commissioner Benjamin Ward asked DOCS to detain, pending resolution of the strike, those alleged parole violators who were not also being detained on new criminal charges, but whose alleged violations were infractions of the rules of parole or conditional release.

33. I agreed to the temporary transfer, but at the conclusion of the transit strike, and ever since, NYCDOC has refused to resume custody of these alleged parole violators. Therefore, DOCS has been forced to house alleged parole violators from New York City at the Queensboro Correctional Facility, the Sing Sing Correctional Facility, the Bedford Hills Correctional Facility, and the Bayview Correctional Facility. The number of alleged parole violators wrongfully forced upon DOCS by NYCDOC has grown to over 700.

34. Substantially due to this imposition upon DOCS' scarce bed space and to NYCDOC's refusal to distinguish between alleged parole violators and parole violators, by November, 1985, a backlog had built up in NYCDOC of adjudicated parole violators who were awaiting consideration by Parole for re-release.

35. This backlog resulted in certain parole violators commencing an action against myself, Commissioner McMickens, and Ramon J. Rodriguez, Chairman of the New York State Parole Board, *Davis et al. v. Coughlin, et al.*, (Sup. Ct. N.Y. Co, Index No. 43168/85). Plaintiffs in that action contend that they, and others similarly situated, have a right to be transferred from NYCDOC custody to DOCS custody and that their continued confinement in NYCDOC, at least so long as defendant McMickens refuses to permit Parole to conduct parole re-release interviews with parole violators in NYCDOC jails, impairs their right to re-release consideration.

36. Chairman Rodriguez and I answered the complaint, denying liability to plaintiffs. Commissioner McMickens also denied liability to plaintiffs, and brought a cross-claim for permanent injunctive relief against myself and Chairman Rodriguez in which she asserted that DOCS is obligated to assume immediate custody of all alleged parole violators. Chairman Rodriguez and I answered the cross-claim, denying liability, and counterclaimed against Commissioner McMickens based on her failure and refusal to take custody of alleged parole violators who are arrested within New York City and who are delivered to NYCDOC by Parole upon their arrest. Motions for preliminary injunction were made both by Commissioner McMickens and by myself and Chairman Rodriguez. These motions are *sub judice*.

37. It is Chairman Rodriguez' and my position that, as a matter of both law and policy, alleged parole violators are in the nature of pre-trial detainees, and belong in the city and county jails around the state, not in DOCS correctional facilities. Chairman Rodriguez and I also take the position that when and if an alleged parole violator is ordered by Parole to be reincarcerated, that individual is to be accepted into DOCS' custody within a reasonable time, with "reasonableness" depending on such considerations as time needed for security and administrative arrangements, availability of space, and individualized facts pertaining to the parole violators. Copies of Chairman Rodriguez and my Verified Answer to Cross-Claim, and Counterclaim, an Affidavit of Chairman Rodriguez, sworn to December 11, 1985,

and an Affidavit of Ward DeWitt, Assistant Commissioner of DOCS, which set forth the basis for Chairman Rodriguez' and my positions, are attached hereto as Exhibits "E", "F", and "G" respectively.

38. I am informed by counsel that, by reason of the state court action, this Court should abstain from considering the questions raised in that action.

39. In addition, I would note that as a result of the state court litigation, priority has been given to accepting adjudicated parole violators who have next available Parole Board dates or Parole Board dates in the next month.

"*Out to Court Inmates*"

40. The procedures for securing the attendance of an out-to-court inmate, *i.e.*, an inmate in a DOCS facility whose attendance is required as a defendant or a witness in State court is left, by statute, to the discretion of the trial court. Criminal Procedure Law 560.10, 630.10 and 630.20.

41. Traditionally, NYCDOC took custody of all out-to-court inmates when it brought new commitments to either Downstate or Sing Sing. Thereafter, NYCDOC would hold these inmates during the pendency of the action. In June, 1981, NYCDOC unilaterally began to refuse inmates on court orders. NYCDOC relied upon new language in the court orders that called upon DOCS to produce these inmates in court. In November, 1981, following negotiations between DOCS, NYCDOC, and the Office of Court Administration, Judge Milonas issued Office of Court Administration Directive 282 which provided that out to court inmates should be held in the city system for no more than ten days.

42. In October, 1982, NYCDOC made the unilateral decision to refuse to accept any DOCS inmates who were out to court pursuant to court order. Although Directive 282 was never changed, in November, 1982, NYCDOC began to accept custody of

out-to-court inmates one day prior to the scheduled court date. Thereafter, NYCDOC would hold such inmates whose presence in court would be required during the succeeding five days. If the action was adjourned for more than five days, the inmate would be returned to DOCS. At the present time, DOCS's practice is to accept custody of out-to-court inmates on a one for one basis. That is, for each inmate DOCS sends to New York City, DOCS takes an inmate into custody.

43. Defendants have stated that this Court ordered that out-to-court inmates should be returned to DOCS if their adjourn date was more than five days away. As this Court knows, that order was the order which set forth the mechanism for removing all out-to-court inmates from LICF after this Court had determined that it did not have the jurisdiction to order them housed there. There has never been any determination by this Court that DOCS has any constitutional responsibility to accept custody of out-to-court inmates within any particular time frame.

45. A 48 hour order affecting out-to-court inmates would work a considerable hardship on the inmate and the courts. The transmittal of an order to produce and the delays inherent in the transportation of inmates from the DOCS' facilities outside New York City would inevitably impede the efficient function of the court system and the expeditious disposition of cases. Orders to produce will be served on the NYCDOC for inmates who are not in its custody and, therefore, will not be produced. This confusion will result in delays which in the past have contributed greatly to a dismissal for lack of a speedy trial.

46. Further, under the existing practice, when an Attica inmate is out to court and he is returned to DOCS custody, he is returned to Attica. If he was the subject of a new order to produce, DOCS would need several days to return this inmate to NYCDOC. In order to receive and record the order, receive the inmate back at Attica (or intercept him in route), await the next draft of inmates south, transport the inmate (two days for actual transit), and produce the inmate on the ordered date, DOCS needs several days. Even so, it is possible to meet such

a timetable only at the expense of the inmate. The inmate must spend a great deal of time in transit. Consequently, the inmate is unavailable to assist in the preparation of his defense or the preparation of his testimony while is enroute. If all out-to-court inmates were immediately returned to state custody, there would be a heightened possibility of misrouting the inmate or misplacing subsequent court orders (sent to stop-over facility, general confinement facility, etc. while the inmate is in another facility). Further, such an arrangement would allow no flexibility for changes to the court calendar in an effort to delay or expedite the proceeding for the convenience of the court.

47. Finally, when an out-to-court inmate is returned to DOCS' custody, he must be incarcerated in a facility of the appropriate security level. There are no maximum security faci-lities in New York City. Insofar as most out-to-court inmates are brought downstate from maximum security facilities, they would have to be held outside New York City.

48. DOCS operates seven correctional facilities in New York City: Arthur Kill, Bayview, Edgecombe, Fulton, Lincoln, Parkside and Queensboro. None of these facilities are maximum security facilities. Only Arthur Kill, Bayview and Queensboro are medium security facilities. The balance are minimum security.

49. The determination of the security classification of a facility depends on the degree to which facility staff can observe and control the movements of inmates, which in turn depends on factors such as the relative impenetrability of the security perimeter and the physical lay-out of the facility. The most secure facilities are classified maximum and are characterized by an impenetrable wall or fence system, single occupancy cells, an ability to isolate housing and program areas through the use of control gates, the existence of special housing areas where unusually dangerous inmates can be segregated and the high degree to which congregate inmate movement can be controlled, observed and, if necessary, isolated and contained. No DOCS facility in New York City meets these criteria.

50. Medium security facilities are characterized by multiple occupancy rooms or dormitories, have a greater degree of inmate movement than a maximum security facility and present fewer physical barriers to congregate movement and activity than a maximum security institution. Housing maximum security inmates at these facilities would require many physical alterations to those facilities. At Arthur Kill, for instance, an elaborate system of traffic control gates would have to be installed. Since multiple-occupancy room arrangements are inappropriate for high-security inmates, many such rooms at Arthur Kill would have to be converted to single-occupancy use by moving a single inmate into a room now housing two or more and by up-grading the locking systems on the doors. Similar cell-security steps would have to be taken at Bayview and Queensboro. Indeed, at these latter two facilities, a fence system or wall would have to be built around them before the security could be considered adequate to house maximum security inmates.

51. In addition, Bayview cannot be used to house male inmates because it is an all-female facility. Queensboro is also unavailable for the purpose of housing out-to-court inmates because it is currently being fully used as a detention center for alleged parole violators (see ¶33, *supra*).

52. As of March 4, 1986 population statistics for DOCS' facilities in New York City were as follows:

FACILITY	SECURITY CLASS	HOUSING CAPACITY	POPULATION
Arthur Kill	Medium – Male	824	815
Bayview	Medium – Female	187	179
Edgecombe	Medium – Male	368	347
Fulton	Minimum – Male	402	343
Lincoln	Minimum – Male	197	184
Parkside	Minimum – Female	60	56
Queensboro	Medium – Males	440	449

Given these population figures, DOCS does not have space available to house out-to-court inmates in any of its facilities in New York City.

53. In addition, Edgecombe, Fulton, Lincoln and Parkside are facilities which house inmates primarily on temporary release status (work release, educational release and job search) who may only be removed therefrom after a due process hearing (*Tracy v. Salamack*, 572 F.2d 393 (2d Cir.1978)), and, therefore, cannot be transferred to provide space for out-to-court inmates.

54. Since I cannot set aside a facility or a portion of a facility with an adequate security classification to accommodate the resulting flow of out-to-court inmates, should plaintiffs be successful in this proceeding, the logistical problems would be further exacerbated. I must retain the authority to transfer inmates among and between facilities to insure the safe and secure operation of DOCS's prisons. The large-scale transportation of inmates that would result if the plaintiffs are successful would expose the state citizens to an increased risk of escape.

55. Finally, there are certain other issues which warrant comment. Specifically:

a. I am informed that at the present time NYCDOC is boarding Federal immigration detainees. While I do not know the number of detainees involved, given the current situation in the DOCS system and certain other counties outside New York City, NYCDOC's asking this Court for relief against the Governor and me, under the circumstances, is irresponsible.

b. Defendants assert that the fact that they currently have to house adolescent males in cells at CIFW is a basis for joining me as a party to this action. I am informed that this is not a new practice.

c. Defendants state that I had requested of them that the 48 hour order be extended to 96 hours. This is not the case. The 96 hour order was the result of negotiations in which I took the position that I should be dismissed as a party and the 96 hour order was an accomodation to defendants.

d. Defendants have known, since September of 1983, that I have taken the position that any claim they seek to assert against

me concerning my obligation to accept custody of inmates is a state law claim which should be litigated in state court. Despite this fact, and with every opportunity to do so, defendants have never done so. Defendants, therefore, cannot be heard to say that my presence as a party to *this* action is the *only* way in which they can obtain relief.

56. In sum, I submit that where counties outside New York City have overcrowding problems, where the DOCS system is itself overcrowded, where DOCS is filling every bed possible, even to the extent of double encumbering beds, and where defendants have failed to come forward with any facts which would support a claim of constitutional deprivation and have failed to assert whatever rights they think they have in state court, I am neither a necessary nor an appropriate party to this action.

WHEREFORE, I respectfully request that this Court deny defendants' motion to join Governor Mario M. Cuomo and me as a party to the above-entitled five actions and vacate the mandatory injunction requiring me "to accept custody of each person housed in correctional facilities of the City of New York who is sentenced to a term of imprisonment in a State facility within forty-eight hours after the necessary papers for transfer have been completed", together with such other and further relief as to this Court may seem just and proper.

/s/ Thomas A. Coughlin III

Thomas A. Coughlin III
Commissioner

Sworn to Before me this
5th day of March, 1986

Notary Public